CULTURE OF UNION FAVORITISM: THE RETURN OF THE NLRB'S AMBUSH ELECTION RULE

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BEFORE THE

COMMITTEE ON EDUCATION AND THE WORKFORCE U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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C O N T E N T S

CULTURE OF UNION FAVORITISM: THE RETURN OF THE NLRB'S AMBUSH ELECTION RULE

Wednesday, March 5, 2014
U.S. House of Representatives
Committee on Education and the Workforce
Washington, D.C.

The committee met, pursuant to call, at 10:04 a.m., in Room 2175, Rayburn House Office Building, Hon. John Kline [chairman of the committee] presiding.

Present: Representatives Kline, Wilson of South Carolina, Foxx, Roe, Walberg, Guthrie, DesJarlais, Rokita, Bucshon, Brooks, Hudson, Miller, Scott, Tierney, Holt, Davis, Grijalva, Bishop, Loebsack, Fudge, Wilson of Florida, Bonamici, and Pocan.

Staff Present: Janelle Belland, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Senior Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Daniel Murner, Press Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Alexa Turner, Legislative Assistant; Ali Al Falahi, Minority Systems Administrator; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; Melissa Greenberg, Minority Staff Assistant; Scott Groginsky, Minority Education Policy Advisor; Eunice Ikene, Minority Staff Assistant; Brian Kennedy, Minority Senior Counsel; Julia Krahe, Minority Communications Director; Brian Levin, Minority Deputy Press Secretary/New Media Coordinator; Leticia Mederos, Minority Director of Labor Policy; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman KLINE. A quorum being present, the committee will come to order.

Good morning. I would like to welcome our guests and thank our witnesses for being with us. For many of my colleagues, this hearing might evoke a sense of *déjà vu.* Not too long ago, we debated a nearly identical ambush election rule proposed by the National Labor Relations Board that would stifle employers' free speech and cripple workers' free choice.

In 2011, the House passed, with bipartisan support, a bill that would have protected the rise of workers, employers, and unions by reining in this radical proposal. Unfortunately, as is so often the case, Senate Democrats refused to defend our struggling workforce. This failure to act gave the Obama Labor Board a green light to continue its assault on America's workplaces. As a result, the Board revived its deeply misguided rule in the desperate hope it will lead to more union members.

The ambush election proposal gives employers only seven days to find legal counsel and appear before an NLRB regional officer at a preelection hearing. During that brief period of time, employers will have to identify every possible legal concern or basically forfeit the ability to raise additional concerns during the course of the hearing. The rule also delays answers to important questions such as determining the appropriate bargaining unit and voter eligibility until after workers have voted.

Additionally, the proposed rule jeopardizes worker privacy by delivering to union organizers employees' names, home and email addresses, work schedules, and other personal information.

It has been almost three years since this proposal was first introduced, and it is just as bad now as it was back then. The Board should have used this time to build public support for changing longstanding policies governing union elections. It didn't. The Board should have also used this time to address the roughly 65,000 comments submitted during the last rulemaking process. It didn't.

And if our Democratic colleagues truly believe the current system is broken, they should have used this time to champion a bill that would enact these changes to the legislative process, but they didn't.

Instead, we are back where we were in 2011, confronting significant changes to labor law imposed through executive fiat without the consent of the American people or their elected representatives. This is the latest example of how disconnected the President and his allies are with the needs of working families.

In 1959, then Senator John F. Kennedy advocated for a 30-day period between the filing of a union election petition and the election. Was Senator Kennedy advocating delay for the sake of delay? Of course not. Our 35th President stated that a waiting period is, quote, "an additional safeguard against rushing employees into an election where they are unfamiliar with the issues."

For decades, concerns about rushing employees into an election have been shared by a majority of the Board and addressed through a fair election process, one that provides workers time to consider the facts, hear from their employees, and consult with their close friends, family members, and coworkers as they try to make a fully informed decision.

The Obama Board wants to tear down existing safeguards and instead impose an ambush election scheme that is meant to empower union bosses by jamming workers and silencing employers. The Board's proposed rule is one more challenge workers and employers will have to face in the midst of this protracted jobs crisis.

Mort Zuckerman, chairman and editor-in-chief of U.S. News and World Report recently wrote, "A more robust economy, stocked by

growth oriented policies from Washington, would help produce the jobs and opportunities that millions of Americans need to climb the economic ladder."

The fundamental problem with the President's labor agenda is this: it has done very little to help put our labor force back to work. Instead, it is designed to simply swell the ranks of dues-paying union members. Employees have the right to join or not join a union. Across the country, they continue to exercise that right. Federal law must ensure a level playing field and ultimately allow workers to make their own decisions.

Next week, Mr. Roe and I will have an opportunity to meet with Chairman Pearce to discuss our concerns with his ambush election rule. If there are opportunities to work together to streamline the election process, like filing documents electronically, we are more than eager to help achieve a reasonable goal. However, if he is determined to ram through the regulatory process a rule that will harm protections enjoyed by workers, employers, and unions, then this committee will do what is necessary and stand by those we are elected to serve.

I will now yield to our distinguished colleague, the senior Democratic member of the committee, Mr. Miller, for his opening remarks.

[The statement of Chairman Kline follows:]

Prepared Statement of Hon. John Kline, Chairman, Committee on Education and the Workforce

Good morning. I'd like to welcome our guests and thank our witnesses for being with us. For many of my colleagues, this hearing might evoke a sense of deja vu. Not too long ago we debated a nearly identical ambush election rule proposed by the National Labor Relations Board that would stifle employers' free speech and cripple workers' free choice. In 2011 the House passed with bipartisan support a bill that would have protected the rights of workers, employers, and unions by reining in this radical proposal.

Unfortunately, as is so often the case, the Democrat Senate refused to defend our struggling workforce. This failure to act gave the Obama labor board a green light to continue its assault on America's workplaces. As a result, the board revived its deeply misguided rule in the desperate hope it will lead to more union members.

The ambush election proposal gives employers only seven days to find legal counsel and appear before an NLRB regional officer at a pre-election hearing. During that brief period of time, employers will have to identify every possible legal concern or basically forfeit the ability to raise additional concerns during the course of the hearing. The rule also delays answers to important questions such as determining the appropriate bargaining unit and voter eligibility, until after workers have voted. Additionally, the proposed rule jeopardizes worker privacy by delivering to union organizers employees' names, home and email addresses, work schedules, and other personal information.

It's been almost three years since this proposal was first introduced and it is just as bad now as it was back then. The board should have used this time to build public support for changing long-standing policies governing union elections. It didn't. The board should have also used this time to address the roughly 65,000 comments submitted during the last rulemaking process. It didn't. And if our democratic colleagues truly believe the current system is broken, they should have used this time to champion a bill that would enact these changes through the legislative process. But they didn't.

Instead, we are back where we were in 2011: Confronting significant changes to labor law imposed through executive fiat, without the consent of the American people or their elected representatives. This is the latest example of how disconnected the president and his allies are with the needs of working families.

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period is "an additional safeguard against rushing employees into an election where they are unfamiliar with the issues."

For decades, concerns about rushing employees into an election have been shared by a majority of the board and addressed through a fair election process, one that provides workers time to consider the facts, hear from their employers, consult with their close friends, family members, and co-workers as they try to make a fully-informed decision. The Obama board wants to tear down existing safeguards and instead impose an ambush election scheme that is meant to empower union bosses by jamming workers and silencing employers.

The board's proposed rule is one more challenge workers and employers will have to face in the midst of this protracted jobs crisis. Mort Zuckerman, chairman and editor in chief of U.S. News and World Report, recently wrote, "A more robust economy, stoked by growth-oriented policies from Washington, would help produce the jobs and opportunities that millions of Americans need to climb the economic ladder."

The fundamental problem with the president's labor agenda is this: It has done very little to help put our labor-force back to work. Instead, it is designed to simply swell the ranks of dues-paying union members. Employees have the right to join or not join a union; across the country they continue to exercise that right. Federal law must ensure a level playing field and ultimately allow workers to make their own decisions.

Next week, Representative Roe and I will have an opportunity to meet with Chairman Pearce to discuss our concerns with his ambush election rule. If there are opportunities to work together to streamline the election process, like filing documents electronically, we are more than eager to help achieve a reasonable goal. However, if he is determined to ram through the regulatory process a rule that will harm protections enjoyed by workers, employers, and unions, then this committee will do what's necessary and stand by those we are elected to serve.

I will now yield to our distinguished colleague, the senior Democratic member of the committee, Representative Miller, for his opening remarks.

Mr. MILLER. Thank you, Mr. Chairman, and good morning.

Today's hearing is about the National Labor Relations Board's proposed rule for a fair workplace election process. This modest rule is designed to ensure that workers have a fair, modern, and standardized process for deciding whether to be represented by a union. The current broken process allows bad actors to use litigation to stall union elections for months. These delays give unscrupulous employers time to engage in threats, coercion, and intimidation of workers.

A 2011 study by the Center on Labor Research and Education concluded that, "the longer the delay between the filing of the petition and the election date, the more likely it is that the NLRB will issue complaints charging employers with illegal activity." The rule addresses these unwarranted delays in several ways. It provides for the electronic filing of petitions and other documents. It requires a more timely delivery of voter lists by an employer. It calls for a timely exchange of information regarding the issues in dispute. And it defers time-consuming litigation over some voter eligibility issues that can be resolved post-election if necessary.

This rule does not, however, change the rather significant imbalance that workers face in an election process. Unions continue to have no right to access the workplace and the workers can be limited to campaigning during non-work hours. By contrast, employers still can campaign 24 hours a day, seven days a week, throughout the workplace. Employers can start campaigning the moment the worker is hired without any notice of a union. The employers can require workers to attend anti-union meetings and still fire workers who don't attend. Employers can also force workers to meet one-on-one with supervisors about the union. While those and other

imbalances remain, the new NLRB rule will help create a more clear, fair and standardized process to ensure that workers' decisions about whether or not to choose a union is made more freely with less manipulation, threats, and intimidation.

Now the majority has derisively said and wrongly said, it has suggested that these NLRB changes would allow for ambush elections. The rule does no such thing. Under the new rule, when a union organizes and files a petition, the election can still be weeks away.

I do not want to say that it is an odd thing to complain about being ambushed by an election. Only something that is not already a democracy complains about being ambushed by a democracy.

But there are plenty of people out there who are trying to ambush and undermine elections. In fact, we saw an ambush in the election just recently in Chattanooga, Tennessee, when Volkswagen workers were voting on whether or not to join the United Auto Workers. In this case, third parties made public comments on the eve and during the vote, clearly sabotaging a fair election for the 1,300 workers at the Volkswagen plant. These outside parties included both well-funded interest groups and elected officials dead set on stopping the workers from joining the union. They were angry with Volkswagen because the company was officially neutral in the election and refused to interfere with the workers' choice. They were angry that Volkswagen had a long track reported of successfully working with labor unions through joint work councils that innovate and reduce company costs. And they were angry that a majority of the workers had signed cards saying they wanted the UAW to represent them. If the election was free and fair, these workers might actually unionize. So these outside parties did what Volkswagen refused to do, they made threats.

Here is what the real ambush looks like: the election was scheduled for three days of voting in February. On the first day of voting, Senator Corker held a press conference and dropped what the media called a bombshell. You can see the bombshell on our first poster over here to the side. Corker announced, "I had conversations today and based on those am assured that should workers vote against the UAW, Volkswagen will announce in coming weeks that it will manufacture the new midsized SUV here."

Hearing that Senator Corker had promised the workers more jobs if they voted against the union and threatened their economic security if they voted for the union, Frank Fisher, the chairman and CEO of Volkswagen in the United States, tried to set the record straight saying, "There is no connection between the Chattanooga employees' decision on whether to be represented by a union and the decision about where to build the new product for the U.S. market."

Senator Corker could not let that denial stand. He replied that Volkswagen's CEO was speaking from old talking points, implying that he had new and secret talking points.

Other Republican legislators got into the action, too. You can see the media headlines on the other posters that illustrate just a few of these threats. One says, Bill Watson, a State Senator, says, "VW may lose State help if the UAW is voted in at Chattanooga plant." Another reads, "Tennessee politicians threaten to kill VW incen-

tives if UAW wins election." In other words, if you don't vote the way we want you to vote, we will kill your job. Again, that is what real election ambush looks like, especially when it comes just as the voting starts.

You might expect to see this kind of voting intimidation by public officials in Russia and China, but not here in the United States. I am interested in what today's witnesses have to say about the shameful ambush and how the NLRB proposed rule might make our elections fairer and freer.

I yield back the balance of my time.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Senior Democratic Member, Committee on Education and the Workforce

Good morning, Chairman Kline.

Today's hearing is about the National Labor Relations Board's proposed rule for a fairer workplace election process.

This modest rule is designed to ensure that workers have a fair, modern, and standardized process for deciding whether to be represented by a union.

The current broken process allows bad actors to use litigation to stall union elections for months. These delays give unscrupulous employers time to engage in threats, coercion, and intimidation of workers.

A 2011 study by the Center for Labor Research and Education concluded that, "The longer the delay between the filing of the petition and the election date, the more likely it is that the NRLB will issue complaints charging employers with illegal activity."

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Unions continue to have no right to access the workplace and workers can be limited to campaigning during non-work times.

By contrast, employers can still campaign 24 hours per day, seven days per week, throughout the workplace.

Employers can start campaigning the moment a worker is hired, without notice to any union.

Employers can require workers to attend anti-union meetings and can still fire workers who don't attend.

Employers can also force workers to meet one-on-one with supervisors about the union.

While those and other imbalances remain, the new NLRB rule will help create a more clear, fair, and standardized process to ensure that a worker's decision about whether to choose a union is made more freely, with less manipulation, threats, and intimidation.

Now the majority has derisively—and wrongly—suggested that these NLRB changes would allow for "ambush elections."

The rule does no such thing. Under the new rule, when a union organizes and files a petition, the election can still be weeks away.

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They were angry that Volkswagen had a long track record of successfully working with labor unions through joint work councils that innovate and reduce company costs.

They were angry that a majority of the workers had signed cards saying they wanted the UAW to represent them.

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One says, "Bo Watson [a state senator] Says VW May Lose State Help If The UAW Is Voted In At Chattanooga Plant."

Another reads "Tenn. politicians threaten to kill VW incentives if UAW wins election." In other words, if you don't vote the way we want you to vote, we'll kill your job.

Again, that's what a real election ambush looks like, especially when it comes just as the voting starts.

You might expect to see this kind of bullying and intimidation of workers by public officials in Russia or China, but not here in the United States.

I am interested in what today's witnesses have to say about this shameful ambush, and how the NLRB proposed rule can make our elections fairer and freer.

Chairman KLINE. I thank the gentleman. Not surprisingly, once again, Mr. Miller and I don't exactly agree.

Pursuant to committee Rule 7(c), all committee members will be permitted to submit written statements to be included in the permanent hearing record.

Without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses. First, we have Ms. Doreen Davis. She is a partner with the law firm Jones Day in New York, New York. Mr. Steve Browne is vice president of human resources at LaRosa in Cincinnati, Ohio. He is testifying on behalf of the Society for Human Resource Management. Ms. Caren Sencer, Esquire, is a shareholder with the law firm Weinberg, Roger & Rosenfeld, P.C., in Alameda, California. I think that is Alameda, California. And Mr. William Messenger is

the staff attorney for the National Right to Work Legal Defense Foundation, Inc., in Springfield, Virginia.

Welcome all.

Before I recognize you to provide your testimony, let me again briefly explain our lighting system. You will each have five minutes to present your testimony. When you begin, the light in front of you will turn green. When one minute is left, the light will turn yellow. When your time is expired, the light will turn red, at which point I will ask you to please wrap up as expeditiously as you are able. After everyone has testified, members will each have five minutes to ask questions. While I am loathe to tap the gavel during witness testimony, I am less so with my colleagues.

Again, I thank the witnesses for being here, and I recognize Ms. Davis for five minutes.

STATEMENT OF DOREEN S. DAVIS, PARTNER, JONES DAY, NEW YORK, NEW YORK

Ms. DAVIS. Good morning. Committee Chairman Kline and the members of the U.S. House Committee on Education and the Workforce. It is both an honor and a pleasure to appear before the committee as a witness.

My name is Doreen Davis, and I am a partner in the Jones Day law firm. My testimony today should not be construed as legal advice as to any specific facts or circumstances. Further, my testimony is based upon my own personal views and does not necessarily reflect those of Jones Day or its attorneys.

I have been practicing labor and employment law for over 35 years, and I work with employer clients located in various parts of the country with varying workforce numbers with a focus on traditional labor law matters. My background includes substantial experience practicing before the National Labor Relations Board, where I started my career as a field attorney handling representation cases. I am a fellow of the College of Labor and Employment Lawyers. I served as the 73rd chancellor of the Philadelphia Bar Association, which is the oldest bar association in the United States, and I have received many accolades from legal publications, including the American Lawyer, Chambers USA, U.S. News and World Report, the Legal 500 United States. A copy of my CV is provided with a written version of my testimony as Attachment A.

Mr. Chairman, I request that the entirety of my testimony and the attachments there to be entered into the record of hearing.

Chairman KLINE. Without objection.

Ms. DAVIS. My testimony this morning addresses the recent initiatives undertaken by the NLRB with respect to representation case procedures. There are a few points I would like to make orally on the record.

First, the NLRB's proposed rule ignores the tens of thousands of public comments submitted in response to the virtually identical rule proposed by the Board in 2011. Instead of taking the public's commentary into account when reproposing changes to the representation case procedures, as the Board did to an extent when it revised the 2011 rule in December of 2011, the Board is returning to nearly the exact rule proposed in June of 2011.

Despite inclusion in the record of public comments for the newly proposed rule, the Board is really doing a disservice to the administrative process by failing to take into consideration any comments when making adjustments to those representation case procedures, which were submitted in 2011.

Second, and related to the issue of the Board's failure to respond to a significant public commentary on the 2011 rule, the Board has failed to take into account watershed changes that have been made related to the area of labor law since 2011. For instance, in 2011, the Board issued the landmark decision of Specialty Healthcare, which overruled decades of prior law on bargaining unit determinations and allowed the certification of so-called micro-units. The contours of this new doctrine of law remain far from clear, and the Board is expected to issue new decisions applying Specialty Healthcare in the coming months.

Moreover, the NLRB's General Counsel, Richard Griffin, has also announced that following these decisions, he will issue further guidance for employers and employees on the new standard for bargaining unit determinations. With such significant changes pending on issues directly related to representation case elections, it is essential that the Board extend the time for comments on the new rules until after the new decisions and the general counsel's guidance are published. This will allow the public, as well as the Board itself, to begin to understand the effect of Specialty Healthcare in conjunction with the proposed new representation rule.

Third, the substance of the rule changes proposed by the Board present significant concerns for employers and employees alike and, to a large degree, conflicts with the clear language and intent of the *National Labor Relations Act.* Foremost among these is the new requirement for a non-petitioning party, generally the employer, to submit a comprehensive statement of position within seven days of the election petition, setting forth all possible issues presented by the petition. Any issues not raised in this statement are forever waived by the employer.

Such a requirement, rather than streamlining and making more efficient the representation process, will almost certainly make them more litigious and drawn out. It will also lead to fewer stipulated or consent elections, which have always been the preference of the regional offices handling these cases.

Additional concerns regarding the substance of the Board's proposed rule, including significant due process concerns, are outlined in the written testimony.

In conclusion, Mr. Chairman, I would be happy to take any questions the committee might have regarding my testimony.

Chairman KLINE. Thank you.

[The statement of Ms. Davis follows:]

DOREEN S. DAVIS, PARTNER, JONES DAY

STATEMENT TO THE RECORD

Hearing on the National Labor Relations Board's Proposed Rule on Representation Case Procedures
U.S. House Committee on Education and the Workforce

March 5, 2014 – 10:00 a.m.

Good morning, Committee Chairman Kline and Members of the U.S. House Committee on Education and the Workforce. It is an honor and pleasure to appear before the Committee as a witness. My name is Doreen Davis,[1] and I am a partner in the Jones Day law firm. My testimony today should not be construed as legal advice as to any specific facts or circumstances. Further, my testimony is based on my own personal views and does not necessarily reflect those of Jones Day or its attorneys. I have been practicing labor and employment law for over 35 years, and I work with employer clients located in various parts of the country with varying workforce numbers, with a focus on traditional labor matters. My background includes substantial experience practicing before the National Labor Relations Board, where I started my career as a Field Attorney handling representation cases. I am a Fellow of the College of Labor and Employment Lawyers. I served as the seventy-third Chancellor of the Philadelphia Bar Association, the oldest bar association in the U.S., and I have received many accolades from legal publications, including *The American Lawyer*, *Chambers USA*, *U.S. News & World Report*, and *The Legal 500 United States*. A copy of my CV is provided with the written version of my testimony as Attachment A.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, my testimony this morning addresses the recent initiatives undertaken by the NLRB with respect to representation case procedures. There are a few points I would like to make orally on the record.

First, the NLRB's proposed rule ignores the tens of thousands of public comments submitted in response to the virtually identical rule proposed by the Board in 2011. Instead of taking the public's commentary into account when re-proposing changes to the representation case procedures—as the Board did to an extent when it revised the 2011 rule in December 2011—the Board is returning to nearly the exact rule proposed in June 2011. Despite the inclusion in the record of public comments for the newly proposed rule, the Board is doing a disservice to the administrative process by failing to take into consideration any comments when making adjustments to those representation case procedures submitted in 2011.

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[1] Ms. Davis can be reached at ddavis@jonesday.com. She would like to acknowledge her associates, Edward Richards and Andrew Madsen, also of the Jones Day Labor & Employment Practice, for their assistance with the preparation of this testimony.

Second, and related to the issue of the Board's failure to respond to the significant public commentary on the 2011 rule, the Board has failed to take into account watershed changes that have been made to related areas of labor law since 2011. For instance, in 2011 the Board issued the landmark decision of *Specialty Healthcare*, which overruled decades of prior law on bargaining-unit determinations and allowed the certification of so-called "micro" units. The contours of this new doctrine of law remain far from clear, and the Board is expected to issue new decisions applying *Specialty Healthcare* in the coming months. Moreover, the NLRB's General Counsel, Richard Griffin, has also announced that following those decisions, he will issue further guidance for employers and employees on the new standards for bargaining-unit determinations. With such significant changes pending on issues directly related to representation elections, it is essential that the Board extend the time for comments on the new rule until after the new decisions and the General Counsel's guidance are published. This will allow the public—as well as the Board itself—to begin to understand the effect of *Specialty Healthcare* in conjunction with the proposed new representation rule.

Third, the substance of the rule changes proposed by the Board presents significant concerns for employers and employees alike, and to a large degree conflicts with the clear language and intent of the National Labor Relations Act "hereinafter "Act')., Foremost among these is the new requirement for the non-petitioning party—generally the employer—to submit a comprehensive statement of position within seven days of the election petition, setting forth all possible issues presented by the petition. Any issues not raised in this statement are forever waived by the employer. Such a requirement, rather than streamlining and making more efficient the representation processes, will almost certainly make them more litigious and drawn-out. It will also lead to fewer stipulated or consent elections, which have always been the preference of the regional offices handling these cases.

Additional concerns regarding the substance of the Board's proposed rule, including significant due-process concerns, are outlined in the written testimony. In conclusion, Mr. Chairman, I would be happy to take any questions the Committee might have regarding my testimony.

- **THE NLRB'S PROPOSED RULE IGNORES THE SIGNIFICANT NUMBER OF COMMENTS THAT WERE SUBMITTED IN RESPONSE TO THE PROPOSED RULE REGARDING REPRESENTATION ELECTIONS PUBLISHED ON JUNE 22, 2011.**

As you know, the Board, on February 5, 2014, over the dissent of Members Phillip A. Miscimarra and Harry I. Johnson, III, re-issued an extensive and far-reaching number of proposed new election rule (hereafter referred to as the "NPRM," which stands for "Notice of Proposed Rulemaking"). The NPRM is virtually identical to rule proposed by the Board in June 2011, which were subsequently revised by the NLRB in December 2011 and were to take effect in 2012. However, the rule was struck down in May 2012 by the district court for the District of Columbia on procedural grounds. Like the 2011 proposed rule, the re-issued rule would modify over 100 sections and subsections of the current Board regulations. The proposed rule, combined with commentary from the Board Members both in support and in dissent, span nearly fifty-three columned pages of the *Federal Register*.

In connection with the prior rulemaking initiative in June 2011, the NLRB received almost 66,000 public submissions or comments, supplemented by 428 transcript pages of oral testimony given during two days of hearings in July 2011. Some comments, particularly those submitted by individual citizens, reveal an inherent distrust of the Board's motives in the rulemaking and strike at the core of the Board's institutional credibility. Other comments illustrate that the Board majority's position on potential changes to representation case procedures makes for poor labor policy both procedurally and substantively, and does not properly address the concerns raised by the Board that allegedly justify such broad, sweeping amendments to the current rule.

Despite the fact that the NLRB received such a significant amount of feedback to its 2011 proposed rulemaking, the Board, approximately two and a half years later, reissued a proposed rule that is identical in substance to its 2011 proposed rule. Indeed, the new NPRM does not incorporate a single suggestion from the 66,000 public submissions or comments. Instead, the Board merely "incorporate[s] by reference into this docket the complete administrative record in the 2011 proceeding," including the comments, and claims that the comments and transcript pages "will be fully considered by the Board in deciding whether to issue a final rule." While the dissent rightfully commends the Board for incorporating the 2011 comments into the administrative record, the fact that the Board did not consider the voluminous amount of material submitted on behalf of interested parties *before* issuing the 2014 NPRM, especially considering that it had two and a half years to do so, is cause for concern. Notably, the Board had *already responded* to public commentary on the 2011 rule changes when it issued revised rule in December 2011. However, none of these changes have been incorporated into the newly proposed rule. In effect, the Board has completely ignored the public comments that are so central to proposed rulemaking under the Administrative Procedure Act.

- **THE NLRB'S PROPOSED RULE FAILS TO CONSIDER THE IMPACT OF RECENT NLRB INITIATIVES AND DECISIONS, INCLUDING UNRESOLVED ISSUES INVOLVING THE BOARD'S *SPECIALTY HEALTHCARE* DECISION.**

As dissenting Members Miscimarra and Johnson cogently pointed out, the NPRM fails to consider the potential impact of such recent NLRB initiatives as the Board's *Specialty Healthcare* standard on determining whether particular employees should be excluded from a petitioned-for unit.

In 2011, the Board released its decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011). In this 3-1 decision, the Board, over the dissent of Board Member Brian Hayes, not only overturned the standard for unit appropriateness determinations in the non-acute healthcare industry that had been in place for 20 years, but also significantly altered its traditional community-of-interest test, explaining that it would no longer address whether the petitioned-for unit is "sufficiently distinct" to warrant a separate unit. The holding in *Specialty Healthcare* effectively reversed a 30-year-old standard for bargaining-unit determinations and has caused much concern in the employer community, with the potential for so-called "micro" units to cost employers significant time and resources and impair productivity and efficiency.

While *Specialty Healthcare* was recently upheld by the Sixth Circuit (*see Kindred Nursing Centers East, LLC v. NLRB*, Nos. 12-1027, 12-1174 (6th Cir. Aug. 15, 2013)), the

potential impact of the Board's 2011 decision remains uncertain. Indeed, the Board has yet to rule on two pending decisions applying *Specialty Healthcare* in the retail context. *See Macy's, Inc.*, Case No. 01-RC-091163; *Bergdorf Goodman*, Case. No. 2-RC-076954. In *Macy's*, the regional director certified a bargaining unit comprising only the cosmetics and fragrances department of a single retail store. Similarly, the regional director in *Bergdorf Goodman* approved a bargaining unit of just the women's shoe sales associates on two floors of a Manhattan department store. Until the Board issues its decisions in these cases, employers face significant uncertainty regarding whether and how employees may form separate units for collective bargaining purposes. If nursing assistants can form a unit separate from licensed practical nurses and other nursing-home employees, and if the sales employees in the women's shoe department can form a unit separate from the other sales employees at a department store, what of the impact on employers in other sectors? Will employees in the paint department of an auto manufacturer be able to organize separately from those who atach the windshield and windows? In short, significant questions remain unanswered.

In December 2013, the NLRB General Counsel stated in comments that the Board will issue additional guidance on the application of *Specialty Healthcare* following the decisions in *Macy's* and *Bergdorf Goodman*. Faced with such a potentially profound change to the determination of bargaining units, and consequently to Board-supervised elections, the Board should extend the period for comments to the NPRM until *after* the General Counsel issues guidance on *Specialty Healthcare*. In this way, all interested parties will be able to take stock of key changes in bargaining-unit determinations and their impact on representation cases and provide effective commentary to the changes proposed in the NPRM.

- **ADDITIONAL SUBSTANTIVE CONCERNS WITH THE NPRM.**

Substantively, the NLRB's proposed rule changes are in excess of the Board's rulemaking authority, are substantively unnecessary, and are contrary to the NLRA. Moreover, the proposed rules evidence poor public policy and are likely to exacerbate, rather than alleviate, labor tension between employers and employees.

The Statement-of-Position Requirement.

One of the central changes contained in the NPRM is the requirement for the non-petitioning party—typically the employer—to raise every potential issue at the initial election hearing or waive those issues. In other words, within seven days of the filing of the petition, the employer would have to assess the situation, consult with legal counsel, consider the propriety of the proposed bargaining unit, and make an informed decision as to what issues to raise at the hearing. Historically, pre-election hearings have been investigatory, not adversarial, in nature. The proposed statement-of-position rule effectively converts the initial hearing to a form of high-stakes litigation, with the significant consequence of issue preclusion should the non-petitioning party fail to raise issues. Moreover, because of the fear of issue preclusion, parties will be unlikely to enter into stipulated or consent elections.

With such a short time period between the petition and the hearing, employers facing the specter of waiver will likely be forced to raise all possible issues in the "statement of position." As a result, the NPRM's statement-of-position requirement presents a significant risk that the

employer will follow the approach of civil defendants in lawsuits and raise every potential issue to avoid the risk of waiver. Doing so would only extend, rather than accelerate, pre-election hearings.

Another likely—and unwelcome—consequence of the statement-of-position requirement would be a reduction in the number of election agreements between employers and employees. Current Board procedures have resulted in election agreements in approximately 90 percent of cases. *See* NLRB General Counsel, Summary of Operations (Fiscal Year 2012), GC Mem. 13-01, at 5 (Jan. 11, 2013). These agreements increase the likelihood that representation elections will be processed faster than the Board guidelines require. Additionally, such agreements are less likely to be contested and extensively litigated, resulting in elections that—whatever the outcome—have less of an adverse impact on employers and employees. With the short deadlines and draconian potential impact of issue preclusion, the likelihood of an adversarial process increases, and the likelihood of a stipulated election agreement decreases. Instead of achieving the goal of streamlined and more efficient election procedures, the NPRM appears to undermine its very intent.

The 20-Percent Rule.

Another central change brought about by the NPRM is the so-called "20-percent rule," which would require the hearing officer at an election to close the hearing and the regional director to direct the election when the only issue in dispute involves the voter eligibility of less than 20 percent of the voting unit. The likely result of the 20-percent rule is that an election would occur with the voter eligibility and unit placement of those individuals in doubt, only to be resolved in the event that their votes would determine the outcome of the election, in which case a post-election hearing would be held to the detriment of the NPRM's goal of shortening the election process.

Accordingly, the likely result of the proposed rule change is that the dispute will have been prolonged, with the status of the employees in question remaining unresolved. Not only does this increase labor tension in the workplace and for specific individual employees, but it also is contrary to the Act's goals of "encouraging practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151. Moreover, the 20-percent rule will create confusion among the eligible voters regarding the composition of the employee bargaining unit. In short, how will an employee make a free and informed choice about whether to vote for the union when the employee does not even know which of his co-workers will be included in the bargaining unit?

Conflicts with the Administrative Procedure Act.

The Board's proposed rule is also flawed in that it conflicts with portions of the Act and, in so doing, likely violates the Board's rulemaking authority under Section 6 and Section 706(2)(A) of the Administrative Procedure Act, which requires that any rule promulgated by the Board must not: (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise in violation of law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A). Specifically, by limiting the scope of the pre-election hearing so drastically and allowing the regional director or hearing officer to deny the non-petitioning party a meaningful pre-election

hearing through the 20-percent rule, the proposed rule is directly contradictory to Section 9(c)(1) of the Act, which requires the Board to hold "an appropriate hearing" prior to an election.

Denial of Proper Oversight.

Additionally, not only does the NPRM make substantial changes to the rules of representation cases, but it also divests employers of the right to review decisions made under those new rules. The proposed rule strips from employers any right to review the hearing officer's determinations prior to and, in nearly all cases, even *after* an election. Instead, if an employer believes that the election was improper, the fastest avenue to review will be to refuse to bargain—clearly contrary to the Act's goals of resolving disputes—and to litigate the resulting Section 8(a)(5) violation before an administrative law judge, the Board and, finally, a U.S. court of appeals. In that instance, again, the NPRM's goal of saving time is thwarted.

Chairman KLINE. Mr. Browne, you are recognized for five minutes.

STATEMENT OF STEVE BROWNE, VICE PRESIDENT OF HUMAN RESOURCES, LAROSA, CINCINNATI, OHIO, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Mr. BROWNE. Chairman Kline, Ranking Member Miller, and distinguished members, my name is Steve Browne. I am the executive director of Human Resources at LaRosa, Incorporated, and I am appearing before you today on behalf of the Society for Human Resource Management, or SHRM, of which I have been a member for 13 years.

Thank you for the opportunity to testify today on the NLRB's proposal to change the rules governing representation elections, otherwise known as the ambush election rule. This rule will fundamentally and needlessly alter the delicate balance that exists in current law which provides an employee the opportunity to make an educated and informed decision to form, join, or refrain from joining a labor organization. If adopted, the proposed regulation would cripple an employee's opportunity to learn the employer's perspective on the impact of collective bargaining on the workplace. Finally, and equally troubling, is that the NLRB is proposing this regulation absent any evidence that it is needed.

Mr. Chairman, allow me to tell you a little bit about my organization. LaRosa is a family owned regional pizzeria change with 16 pizzerias, a call center, manufacturing commissary, and a corporate office. I am proud to say we are celebrating our 60th anniversary this year, a rarity in the restaurant industry. We have a long tradition of promoting from within in our company. In fact, all of our assistant and general managers started out on the front line.

LaRosa has been an employer of choice since its founding in 1954. Our turnover is low because we take care of our team members, who in turn provide our guests with a great experience when they purchase our great food. We dedicate a significant amount of time and effort to communicating to our team members about important workplace decisions, which requires a great deal of planning and preparation. This is why I share SHRM's concern with the Ambush election rule.

LaRosa would not be prepared to effectively respond to the organization effort, nor would we be able to inform our 1,200 employees adequately about our perspective on the organizing effort prior to the election. Considering we have had two years now to educate our workforce on the *Affordable Care Act,* I cannot envision how we would possibly educate our team members about an organizing drive in 10 days.

SHRM believes that shortening the time between filing a petition and the election will create an imbalance between the rights of employees, employers and labor organizations. This will severely limit an employer's ability to share its perspective with employees about the organizing drive, thus creating a distinct disadvantage for employers.

The rule's expanded requirement for providing personal, confidential information about employers is also very disconcerting.

This requirement feels like an invasion of privacy for employees and an unnecessary data collection burden on the employers.

At LaRosa, we don't collect employees' personal email addresses or unlisted phone numbers, as employees are reluctant to share this information. I can only speak for LaRosa, but I surmise this would be a similar reaction at many workplaces, that employees will be dismayed, if not outright angry, to learn that this type of personal information is being shared with a third party without consent. And, unfortunately, it does not appear that the rule has any safeguards in place to protect employee information from disclosure.

Equally troubling is the new proposed requirement for the voter eligibility lists and employee contact information to be provided to the union within two workdays of the direction of election. While we update our employee information constantly at LaRosa, I am positive there are instances where the information is outdated or incorrect, and it may be next to impossible to accurately compile this information in two business days.

Mr. Chairman, the ambush election rule appears to be a solution in search of a problem. NLRB data shows that elections are currently held rather expeditiously, on average within 38 days. Therefore, SHRM believes the rule's reduced timeframe is unnecessary because current law provides employees ample time to hear from both the union and the employer prior to an election.

SHRM recognizes the inherent rights of employees to form, join, assist, or refrain from joining a labor organization, and these rights need to continue to be protected. However, SHRM believes an employee's decision regarding unionization should be based on relevant and timely information and free choice.

Mr. Chairman, thank you, again, for allowing me to share SHRM's views on the NLRB's proposed ambush election rule. SHRM believes that this rule is imbalanced and therefore should be abandoned. I welcome your questions.

Chairman KLINE. Thank you.

[The statement of Mr. Browne follows:]

STATEMENT OF STEVEN J. BROWNE, SPHR
EXECUTIVE DIRECTOR OF HUMAN RESOURCES

LAROSA'S, INC., CINCINNATI, OHIO

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO

U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

HEARING ON

"CULTURE OF UNION FAVORITISM: THE RETURN OF THE NLRB'S AMBUSH ELECTION RULE"

MARCH 5, 2014

Introduction

Chairman Kline, Ranking Member Miller and distinguished members of the Committee, my name is Steve Browne. I am the Executive Director of Human Resources at LaRosa's, Inc., in Cincinnati, Ohio. I am appearing before you today on behalf of the Society for Human Resource Management (SHRM). I have been a human resources professional for over 25 years in the manufacturing, consumer products and professional services industries, and a member of SHRM since 2000. I currently serve on SHRM's Membership Advisory Council representing 10 states in the North Central region, and I am the past State Director of the Ohio SHRM State Council. LaRosa's is a family-owned regional pizzeria restaurant chain in Southwest Ohio and Southwest Indiana with 15 pizzerias and over 1,200 team members. Thank you for the invitation to appear before you on behalf of SHRM's more than 278,000 members in over 140 countries.

SHRM is the world's largest association devoted to human resource (HR) management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM has deep concerns and strong reservations with regard to the February 5 Notice of Proposed Rulemaking (NPRM) issued by the National Labor Relations Board (NLRB) on the rules and regulations governing representation case elections. As the Committee is aware, the NLRB unsuccessfully proposed changes to the Board's rules governing election processes, otherwise known as the "Ambush Election Rule," in December 2011. The rule was challenged in U.S. District Court for the District of Columbia, in the case *Chamber of Commerce et. al. v. National Labor Relations Board.* The rule was declared invalid due to NLRB procedural error and the case has been dismissed.

As was the case with the rule from December 2011, the February 5 NPRM Ambush Election Rule will fundamentally and needlessly alter the delicate balance that exists in current law that provides for the opportunity for an employee to make an educated and informed decision to form, join or refrain from joining a labor organization. If adopted, the proposed regulation would severely hamper an employer's right to exercise free speech during union organizing campaigns and cripple the ability of employees to learn the employer's perspective on the impact of collective bargaining on the workplace. Finally and equally troubling is that the NLRB is proposing this regulation absent any evidence that it is needed.

In my testimony, I will outline SHRM's views on employee rights under federal labor law, provide background about our company and its workforce and the practical challenges this rule raises for my organization, as well as share SHRM's specific concerns over the proposed NLRB regulation.

SHRM views on employee representation
Enacted in 1935, the National Labor Relations Act (NLRA) is the principal statute governing collective bargaining activities in the private sector. The NLRA was enacted to ensure the right of employees to assemble and collectively bargain with employers on matters of workplace welfare, including wages, hours, working conditions and benefits.

SHRM supports balanced labor-management relations. SHRM recognizes the inherent rights of employees to form, join, assist or refrain from joining a labor organization. Employee NLRA rights to form, join, assist or refrain from joining a union without threats, interrogation, promises of benefits or coercion by employers or unions must be protected. SHRM believes an employee's decision on unionization should be based on relevant and timely information and free choice, and that representation without a valid majority of employee interest is fundamentally wrong.

Ultimately, SHRM believes that HR professionals have a responsibility to understand, support and champion employment-related actions that are in the best interests of their organizations and their employees with regard to third-party representation by labor unions.

The restaurant industry and LaRosa's
LaRosa's, Inc. is unique in the restaurant industry in that it's celebrating its 60th anniversary this year. This is uncommon because most restaurants, and companies in general, don't last this long. In order to continue to be successful, we do our best to be profitable in an industry marked by steep price competition from global and national pizza chains as well as other business pressures. Ohio's minimum wage is already ahead of the national minimum wage and average pay, and as a result we are dealing with wage compression throughout our organization to find and secure talent.

LaRosa's has 15 pizzerias that are Family Italian restaurants ranging from full-service dine-in locations to delivery/carry-out locations. We also have a call center, manufacturing commissary and a Corporate Office. Our workforce is made up of 85 percent part-time and 15 percent full-time employees. The majority of our employees, 71 percent, work in our pizzerias as location managers, cooks, delivery drivers, servers and hosts. Our average employee tenure in the pizzerias is 4 years. However, 25 percent of our pizzeria team members have worked over 5 years and 12 percent have worked over 10 years for the company. We have 11 employees with 25+ years of service in our stores.

LaRosa's, Inc. has been an employer of choice since its founding in 1954. We have literally had employees from different generations of the same families work for us. Turnover ranges from 17-20 percent for our general workforce depending on the season, compared to 29 percent for the restaurant industry overall, according to SHRM data. We have a very open environment that follows our company philosophy of "Reach Out and Make Smiles." Taking care of our team members in turn gives our guests a great experience when they purchase our great food. We have a long tradition of promoting from within at our company. In fact, all of our Assistant Managers and General Managers started out on the

front line. We also have Executives and Corporate staff who began their career on the front line in the pizzerias.

Our HR operations are very lean in working with multiple locations, many types of operations and a variable workforce. I have myself and one full-time HR Manager as well as three part-time staff who are specialists handling payroll, benefits and call center recruiting. We take an intentional, individual approach to HR across our organization versus a "one size fits all" approach. This takes effort, but it allows us to have a culture of communication and development so that we "meet people where they are" to do all we can to allow them to perform to the best of their ability.

Concerns with the NLRB's NPRM Ambush Election Rule

The NPRM Ambush Election Rule, first, would substantially shorten the period of time between when a representation petition is filed with the NLRB and when an election is held; and, second, would require employers to more quickly provide union representatives with employee contact information, including personal telephone and e-mail information.

At LaRosa's, we dedicate a significant amount of time and effort to communicating to our team members about important workplace decisions, like employee benefits, compensation and health care. These are important decisions that impact not only our team members, but often the team members' families as well. As mentioned above, our 1,200 employees are spread across two states in 15 locations over variable schedules and shifts. Whenever we are communicating to our employees about workplace issues, a great deal of planning and preparation goes into the effort. In many situations, it requires multiple meetings over multiple days and times in order to make sure that we are able to communicate and educate our team members directly and to answer any questions they may have.

A recent example of this is when LaRosa's converted its health care plan from a Point of Service (POS) option to a high-deductible Health Savings Account (HSA) plan. We had a mandatory meeting set up at an offsite location and paid all team members to attend so they could learn of this significant shift because it affected everyone who was eligible for, as well as currently enrolled in, our Group Health Plan. We wanted everyone to be clear as to the new plan offering and how it affected each of them. We brought in our insurance broker as well as people from the health insurance carrier. We offered employees a chance to talk individually with representatives from the carrier to get answers to any personal questions the employees had. Having this meeting altered production, put pressure on shifts to be covered in our restaurants and asked people to alter their schedules significantly versus what they were used to. Despite making every effort we could to make it easier for people to attend, we still had many employees who didn't come to the session. Although LaRosa's has never experienced an effort to organize the workplace, I suspect it would require a similar significant response of time and focus from our management team to educate our supervisors, staff and employees about the rights, requirements and our opinions on the organizing drive. Considering we have had two years now to educate our workforce on the continuing changes of the ever-evolving Patient Protection and Affordable Care Act, I

cannot envision how we could possibly educate our team members about an organizing drive in 10 days.

After all, unions can prepare their entire organization campaign before making it public. Unless employers have adequate time to prepare their educational materials, employees will not have full information about the pros and cons of unionization. While the precise length of time for the election process will vary under the proposed Ambush Election Rule, the rule could shorten the process to as little as 10 days.

As I stated at the beginning of my testimony, I have been an HR professional for over 25 years, and I am extremely familiar with an employer's rights and responsibilities under the NLRA. However, under the Ambush Election expedited process, LaRosa's would not be prepared to effectively respond to the organization effort, nor would we be able to inform our 1,200 employees adequately about our perspective on the organizing effort prior to the election.

SHRM believes if the Ambush Election Rule is adopted, shortening the time between filing a petition and the election, it will create an imbalance between the rights of employees, employers and labor organizations in the pre-election period. In turn, this will severely impact an employer's freedom of speech and ability to share its perspective with employees about the organizing drive, thus creating a distinct disadvantage for employers in the organizing process.

Another major concern for SHRM is that the proposed Ambush Election Rule will significantly impair small employers in responding to petitions in an accelerated manner and will present significant burdens in responding to petitions for large employers with diverse and large voting units. For example, a small employer may not have an HR professional on staff or access to legal counsel that specializes in labor issues. A large employer, on the other hand, may have such a geographically dispersed workforce and centralized operations where communicating with its employees in such an expedited manner is almost impossible.

The Ambush Election NPRM expanded requirement for providing personal, confidential information about employees is also very disconcerting to SHRM. We believe this new requirement to provide so much confidential information about an employer's employees constitutes an invasion of privacy for employees and an unnecessary data collection burden on employers. At LaRosa's, we do not collect employees' personal e-mail addresses or unlisted phone numbers for any other business function, as employees are reluctant to share this information. I can only speak for LaRosa's, but I surmise this would be a similar reaction at many workplaces, that employees will be dismayed, if not outright angry, to learn that this type of personal, confidential information is being shared with a third-party without consent. Finally, protecting employee privacy and personal information is important to employees and employers. Unfortunately, it does not appear that Ambush Election Rule has in place any safeguards to protect this employee information from disclosure.

Third-party access to this information also creates an invitation to distract employees during the workday, which, depending on the workplace setting, may create unsafe working conditions.

Equally troubling is the new proposed requirement in the NPRM for the voter eligibility list and employee contact information to be provided to the organizing union within two workdays of the Direction of Election instead of the current law requirement allowing seven workdays. While we update our employee contact information frequently at LaRosa's, I am positive there are instances where the information is outdated or incorrect. I suspect that is true for the bulk of employers in the United States. Additionally, for security reasons, employee information may be housed in different software programs or databases, meaning it may be next to impossible in some circumstances to compile this information in two business days let alone guarantee its accuracy.

The proposed Ambush Election Rule appears to be a solution in search of a problem. For example, union density has declined for decades in America. According to the Bureau of Labor Statistics, only 11.3 percent of wage and salary workers in the public and private sectors were members of a union in 2013, compared to 20.1 percent in 1983.[1] Labor organization leaders have long argued that current laws on union representation favor management and hinder employees' ability to organize a union. However, data produced on the NLRB's website in 2013 reveals that the median time from a representation petition to an election was 38 days—proof that the period is generally reasonable for employees to weigh the important choice of whether or not to unionize.[2] It appears the proposed rule is not justified by the data that demonstrates that elections are held rather expeditiously, and the NLRB has not demonstrated why the 38-day average time period needs to be shortened. Therefore, SHRM believes the proposed Ambush Election Rule's reduced timeframe is unnecessary because the current 38-day average period gives employees ample time to hear from both the union and employer prior to a representation election.

Finally, SHRM believes it's important to raise a concern over the potential impact that the Ambush Election Rule could have taking into consideration the NLRB's decision in *NLRB v. Specialty Healthcare and Rehabilitation Center of Mobile (Specialty)* of Aug. 26, 2011. In *Specialty*, the Board established a new standard in which it will find that a unit is appropriate unless the employer demonstrates that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. In essence, the *Specialty* decision allows labor organizations to form "micro-bargaining units" and "fragmented units" by permitting them to target only subsets of employees who are most likely to support the union. The combination of the NPRM with the *Specialty* decision seems to tip the scale to a near certainty that a business unit would in fact be organized as it could

[1] Bureau of Labor Statistics, U.S. Department of Labor (2014). http://www.bls.gov/news.release/union2.nr0.htm
[2] National Labor Relations Board (2014). Median Days to Elections Graph, Fiscal Year 2004-2013, http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election

make it very difficult for an employer to respond quickly and effectively to be able to present information to employees to make an informed decision.

Conclusion

Mr. Chairman, thank you again for allowing me to share SHRM's views on the NLRB's proposed Ambush Election Rule. SHRM believes that this reissued rule is imbalanced and would limit employer free speech during union organizing campaigns. The rule will also prevent many employees from receiving adequate information to make an informed decision on whether to join or not to join a union. SHRM believes the Ambush Election Rule would have a chilling effect on labor-management relations and therefore, it should be abandoned. I welcome your questions.

Chairman KLINE. Ms. Sencer, you are recognized.

STATEMENT OF CAREN P. SENCER, ESQUIRE, SHAREHOLDER, WEINBERG, ROGER & ROSENFELD P.C., ALAMEDA, CALIFORNIA

Ms. SENCER. Chairman Kline, Ranking Member Miller, and members of the committee, thank you for this opportunity to testify on the importance of updating the NLRB's procedures to reduce gamesmanship, promote efficiency, ensure uniformity among regions and effectuate the *National Labor Relations Act's* goal of employee free choice.

When a union files a petition on behalf of a group of workers seeking representation, the statute provides that the workers' desire to vote for or against representation should be promptly honored. In the absence of an employer's voluntary recognition, the workers also have an opportunity to vote in a timely election. But too often employers exploit the current rules and procedures to delay the election as long as possible or avoid an election altogether.

The current rules and procedures favor the parties entering into a stipulated election agreement. If the agreed-upon date is within 42 days from the date the petition was filed, it will generally be approved by the regional director.

Of course, there is nothing wrong with encouraging parties to reach an agreement, but this agreement comes at a price. Often the employer will force the union to accept concessions, for example, to remove or add workers to the unit. It almost always requires agreeing to the 39th, 40th or 41st day for the election. The union agrees to these concessions and the dates because the alternative is a hearing process which results in an election not being held until a minimum of 65 days after the petition was filed. Simply by threatening a hearing, even when there is no genuine dispute, employers inject unnecessary delay into the representation process.

The NLRB's proposed rules take important steps towards reducing the opportunity for unnecessary delay. The region would have the discretion to refuse to open a hearing or to limit areas on which evidence can be presented. It would allow some disputes to be resolved if resolution is still necessary after the election. If a hearing is held, the streamlined process would result in a more focused, prompt hearing, and the record would be closed faster. Once the decision and direction of election is issued, the election would be held sooner, as the 25 days for pre-election review by the Board would no longer be necessary. The employer would retain an opportunity for full review after the election.

I have been involved in approximately 200 representation cases. In one earlier this year, a client filed a petition seeking to represent a unit of one classification of employees working for a subcontractor of the Federal Government. This particular subcontractor has other collective bargaining agreements with the international union covering only the classification in question. The employer asked for an extension of time to hold the representation hearing. The parties assured a SIP for the representative.

The day before the rescheduled hearing, it was clear there would be no stipulation because the employer sought to add an additional

job classification, doubling the size of the proposed bargaining unit. The employer also informed the region it would not be appearing at the scheduled hearing. The union still had to appear and provide testimony about its labor organization status, the Board's jurisdiction over the employer and the propriety of the proposed unit, which, under Board law, was presumptively appropriate.

That was February 12th. A direction of election has still not issued, and when it does, it is expected to include the mandatory 25 day waiting period to allow the parties to seek review, notwithstanding the employer's refusal to participate in the process. The employees filed their petition on January 31st. They will be lucky if they are able to cast their vote in early April. This is just one of many examples of delay for delay's sake.

If the proposed rules were in place, it is questionable whether the postponement of the representation hearing would have been granted. The morning of the hearing upon the employer's failure to appear, the regional director could have issued a direction of election without holding a hearing, as there was no dispute regarding the scope of the bargaining unit. The employer would have had two days to produce the Excelsior list of employee names and contact information. Given the size of the unit, the union would have likely waived the right to have this information for a full 10 days.

If the proposed rules were in place, the election would have already been held. Instead, the employees are prevented from exercising their right to vote. This case, with the employer's gamesmanship of delaying the initial hearing and then boycotting the hearing process, highlights the importance of the NLRB's proposed election rules in improving the election process.

These rules are not revolutionary or radically different than the status quo. They reflect an attempt to standardize some of the best practices already being used and create consistency between the regions. The proposed rules reduce unnecessary delay, simplify the procedure and permit the parties to seek Board review after the election, at which time the parties know which, if any, prior disputes are still relevant or determinative. This saves time and money for employers, unions and the government while promoting the Act's goal of employee free choice.

Thank you, and I hope my experience with the Board's procedures is helpful to this committee.

Chairman KLINE. Thank you.

[The statement of Ms. Sencer follows:]

Testimony of Caren P. Sencer, Esq.

Before the Committee on Education and the Workforce

United States House of Representatives

March 5, 2014

Hearing on

NLRB's Proposed Rulemaking Concerning Representation Case Procedures

Chairman Kline, ranking member Miller and members of the Committee, thank you for this opportunity to testify on the importance of updating the National Labor Relations Board's procedures to reduce gamesmanship, promote efficiency, ensure uniformity among regions, and effectuate the National Labor Relations Act's goal of employee free choice.

I am a partner in the law firm of Weinberg, Roger and Rosenfeld based in Alameda, California. Our firm, small by management standards, is one of the nation's largest representing unions, working people and their institutions, including trust funds and apprenticeship programs. Our client base includes unions representing public and private sector, construction, agriculture, service and white collar workers. We are proud to represent some of the largest and smallest unions in California and our work extends through most of the western states.

I have been with the Firm full time since my 2004 graduation from the University of California, Berkeley School of Law. While at a Berkeley, I served as the Editor in Chief of the Berkeley Journal of Employment and Labor Law. Prior to law school, I earned my Bachelors of Science at the New York School of Industrial and Labor Relations at Cornell University.

In my current work, I have had broad exposure to the NLRB representation process and have played a role in assisting clients in approximately 200 representation petitions.

When a union files an election petition on behalf of a group of workers seeking union representation, the statute provides that the workers' desire to vote for union recognition should be promptly honored. In the absence of an employer's voluntary recognition, the workers ought to have an opportunity to vote in a Board conducted election in a timely manner. But too often, employers exploit the current rules and procedures to delay the election as long as possible or avoid an election altogether.

Currently, the regional offices of the NLRB attempt to implement a goal of conducting elections within 42 days of the filing of the petition. In many cases, the parties are able to stipulate to the scope of the bargaining unit and to the time and place for the election because of the efforts of the Regions to apply the 42 day time goal.[1] Generally, a Regional Director will approve a stipulated election agreement if the

[1] The processing of representation petitions is described in 29 C. F. R. 102.62. It is this provision and others which would be modified by the proposed rule changes.

election date is within that 42-day period. Most employers insist upon the 39th, 40th, or 41st day for an election. The Union has no choice but to agree to this delayed election because, if the matter goes to a hearing without a stipulated election, the hearing will inevitably result in delay of the election for at least several weeks beyond the 42nd day.

The employer can use many tactical devices under the current rules to force this delay. Normally, most Regions will schedule a hearing for the 7th day after a petition is filed. Employers request and are routinely granted a continuance of up to a week. If the hearing is held, it may last several days, and the parties are given the opportunity to file a closing brief one week (or more) later. The record is thus closed at the earliest approximately 3 weeks after the petition is filed. The Regional Director then issues a Decision and Direction of Election. This generally takes at least two weeks but often significantly longer. The election is directed for around 30 days after the Regional Director's decision, in order to allow either party an opportunity to seek review from the Board. As a result, in cases where there is no stipulation and a hearing is held, the election is not held until a minimum of 65 days and often longer after the petition is filed. Thus the employer has all the leverage to insist on delay until the 42nd day or beyond because otherwise it can force a hearing even when one is not necessary, delaying any election weeks and sometimes months longer. By threatening to delay the election, often the employer will force the union to accept concessions, for example, to remove or add workers to an already appropriate unit, to agree to an election day (such as pay day), or other procedures that favor the employer.

I should add that in virtually all the cases where clients have filed election petitions, the employers have been well aware of the organizing efforts prior to the filing. In many cases, employers have already started their overt anti-union campaign. In some cases, they have made a tactical decision notwithstanding the organizing campaign to take no action until after the petition is filed. Many employers have anti-union inoculation programs in place that seek to influence employees from the date of hire regardless of whether or not the employer has ever been a target of union organizing. In my experience, virtually every employer is aware of any union organizing effort and can begin its campaign, if it chooses to engage in one, long before any petition is ever filed.

I should also add that I have been involved in elections under the California Agricultural Labor Relations Act where, by statute, elections are conducted within 7 days of the filing of the election petition.[2] That process seems to run smoothly. The employers, their representatives and the Agricultural Labor Relation Board have adapted to the statutory mandate of elections within 7 days, a provision which has been in place since the statute was enacted.

The NLRB's proposed rules take important steps toward reducing the opportunity for unnecessary delay. The Regions would be permitted to grant an extension from the original hearing date only under special circumstances. Written closing briefs would not be a matter of course but rather would require special permission, for example, in complex cases. Most cases only involve one or two issues and they are typically the same issues regarding supervisory status and community of interest. As a result, oral closing arguments would become the norm, thus eliminating up to 2 weeks of delay caused by waiting

[2] California Labor Code 1140 *et seq.*

for transcripts and briefs to be filed. Hearing officers of the NLRB are trained to develop complete records for the Regional Director and closing arguments are more than sufficient to explain a position at the close of the hearing. Moreover, this would reduce the expense for all parties to the process.

The NLRB's proposed rules also eliminate the pre-election request for review to the Board and require instead for appeals to be consolidated during the post-election process. With these reforms, under the proposed rules, elections could be set promptly after an election is directed by the Regional Director, in contrast to the current practice, under which elections are delayed for at least 25 days after a decision. This would bring the Board's rules in line with most other administrative agencies and courts where interlocutory appeals are not permitted or are severely limited.

We anticipate that the proposed rules will substantially reduce the number of hearings, since a hearing will no longer carry with it the same opportunities for delay and thus, the threat of forcing an issue to hearing would carry less weight. In addition, under the Board's proposed rules, absent true dispute between the parties, the Regional Director would have the discretion to refuse to open the record to hold a hearing. We anticipate the new rules will encourage more stipulated elections and thereby shorten the time that workers have to wait to be able to exercise their right to vote and eliminate litigation carried out solely for tactical advantage in the campaign and election.

Eliminating delay serves the purposes of the National Labor Relations Act in promoting employee free choice. Employers will benefit because it will reduce the time period during which employees are distracted by the campaign and upcoming election. The new streamlined process will be less expensive for the employer and the union and will be easier and less cumbersome for the Agency to administer. It is difficult to see how anyone is disadvantaged by eliminating unnecessary litigation and unnecessary delays before employees can make a free choice through the election process.

The proposed rules are not ground breaking, nor, to be perfectly frank, do they go far enough. The proposed rules reflect practices that have been applied in some Regions already and are not particularly controversial. Most of my practice is in the seven Regions on the west coast. From my experience, representation hearings are regularly scheduled to be held 7 days after the petition is filed. Petitions are accepted by fax with copies of the showing of interest with the original signatures to be received by the Regional office within 48 hours. When there is a dispute over scope of the bargaining unit, but the number of employees in the disputed classifications represents less than 20% of the entirety of the unit, the Regional Directors regularly approve stipulations for election indicating employees in the disputed classifications will vote subject to challenged ballots. The proposed rules would simply codify some of these already existing best practices. Many employers have accepted these practices although they use the threat of litigation to delay the election until the 42nd day and to extract concession on the composition of the unit, the election date, and election mechanics from the union which wants to avoid a lengthy hearing process.

Other changes will reduce parties' ability to exploit the process for tactical advantage by forcing parties to clarify their position on relevant issues. The "statement of position form" in the proposed regulations is a good example of this. Under the proposed regulations, no later than the start of a pre-election

hearing, an employer would be required to commit to its position regarding the composition of the bargaining unit in writing. In one case recently handled in my office, the employer, represented by a skilled management firm, first requested an extension of time before the start of the representational hearing. The last day before the rescheduled hearing, the parties entered into a stipulation that referenced six team leaders and explicitly did not determine their voting eligibility. The election was set for 30 days later -- the 42nd day after the petition was filed.

These 6 team leaders represented less than 10% of the total unit. The day of the election, the Board Agent asked the employer its position on the six individuals. The Employer asserted that the six individuals were supervisors and the Board Agent challenged each of the individuals so when they voted, their ballots were segregated and impounded. After the voting was concluded, the employer again stated its position that the six were supervisors. The Union accepted the employer's position. After the vote count, the employer reversed its position to claim the employees were not supervisors and should be eligible to vote. This statement was made after it was clear the six votes would be determinative if they were counted in what was a very close vote count. There was no rationale provided by the employer for its change of position.

This led to post-election litigation of the supervisory status of the individuals with the burden on the Union to prove supervisory status after the employer had been asserting it from the beginning! The Hearing Officer issued his Report and Recommendation regarding the challenged ballots roughly 5 months after the petition was filed, and found that all six team leads were supervisors. The matter was transferred to the Board for post-election review and has remained there for over 7 months because the employer filed exceptions asserting, contrary to its long held position, that the six were not supervisors!

If the employer had been required to commit to a position on the six leads at the outset or, at least, at the challenge stage, much of this posturing would have been avoided. Even if, based on the stipulated election agreement, the proposed position form had not been required; many of the proposed rules would have reduced the delay involved in this case. Under the proposed rules, as the parties did not have a dispute affecting more than 20% of the unit, the Region could have unilaterally set the election before the 42nd day. The Union would not have been pressured into the last acceptable day by the threat of a hearing when no issues requiring pre-election resolution were pending. Under the proposed rules, the employer would have produced a complete *Excelsior* List[3] with detailed information no later than the 2nd day after the stipulation, rather than 7 days and the Union, if it so desired, could have waived the right to have the *Excelsior* list for a full 10 days before the election. As a result, under the procedures in the NLRB's proposed rules, the election could have been set for a few weeks after the petition was filed. Even if the election was held on the 42nd day after the petition was filed and the employer was entitled to change its position on the supervisory status of the team leads between the end of the election and the end of the vote count, the question of representation would still have been resolved at least 7 months faster under the proposed rules because the Board could have simply denied review of the Hearing Officer's Recommendation on this routine issue of supervisory status, allowing the Regional Director to issue a final decision.

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[3] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

In a different region earlier this year, I filed a petition on behalf of a client seeking to represent only a small unit of employees – all the employees inside a particular job classification – working for a subcontractor of the federal government. This particular subcontractor has approximately six collective bargaining agreements with this international union, and each CBA is specific to a particular federal worksite. The employer asked for an extension of time to hold the representation hearing – "the parties are sure to stip," said the representative. The day before the rescheduled hearing, it was clear that there would be no stipulation because the employer sought to add an additional job classification, which would double the size of the proposed bargaining unit. The employer also informed the Region that it would not be appearing at the hearing scheduled for the following day. The Union still had to appear and provide testimony about its labor organization status, the Board's jurisdiction over the employer, and the propriety of the proposed unit which, under Board law, was a presumptively appropriate unit. That was February 12. A direction of election has still not issued and, when it does, it is expected to include the mandatory 25 day waiting period to allow the parties to seek review notwithstanding the employer's refusal to participate in the process. The employees filed their petition on January 31. They will be lucky if they are able to cast their vote in early April.

If the proposed rules were in place, it is questionable whether the continuation of the representation hearing date would have been granted. The morning of the hearing, upon the employer's failure to appear, the Regional Director could have issued a direction of election without holding a hearing as there was no dispute regarding the scope of the bargaining unit. The employer would have 2 days to produce the *Excelsior* List. Given the size of the unit, the Union would likely have waived the right to a full 10 days with the *Excelsior* List. If the proposed rules were in place, the Election would have already been held. Instead, the employees are still waiting for a direction of election and are prevented from exercising their right to vote. This case, with the employer's gamesmanship of delaying the initial hearing and then boycotting the hearing process, highlights the importance of the NLRB's proposed election rules in improving the election process.

As a final example, a client filed a petition for a unit of approximately 45 automobile mechanics. Despite well established Board law that automobile mechanics constitute a traditional craft unit that is presumptively appropriate, the employer insisted on a hearing where it took the position that service writers must also be included. The service writers would have constituted more than 20% of the unit. A hearing was held two weeks after the petition was filed. The employer requested and was provided with an extension to file a post-hearing brief. In its brief, the employer abandoned its position that the only appropriate unit needed to include the service writers. As a result, there were only 6 positions (representing less than 15% of unit) in dispute. The Regional Director issued a Decision and Direction of Election two weeks later. The election was directed in the unit the Union had originally petitioned for. The election was set for 26 days later. On the fourteenth day after the Decision and Direction of Election issued, the Employer filed a Request for Review of the Decision of the Regional Director.

The election was held 78 days after the petition was filed. The morning of the election, the Board issued an Order amending the Regional Director's Decision in part and sustaining it in part. It allowed for four additional individuals to vote under the challenged ballot procedure. During the election, two additional individuals whom the employer believed should have been in the unit were denied ballots by the Board

Agent because the Board had already ruled that they were ineligible to vote. This alleged "disenfranchisement" to use the employer's phrase, served as the basis for the employer's objections to the election which were served 4 days after the election. The hearing on the objections was set for a month later and was held over 2 non-consecutive days. The second day was set for the employer to produce witnesses who had not been available the first day of hearing. Those witnesses were not produced on the second day and the employer disingenuously bought additional delay. The Employer filed a closing brief a week later. The Administrative Law Judge issued his recommended decision 40 days after the second day of hearing. The recommended decision overruled each of the employer's objections and directed the four challenged ballots to be counted. The number of ballots to be opened and counted was insufficient to affect the outcome of the election and the Union won. The employer took exception to the report of the Administrative Law Judge. The Decision from the NLRB issued 9 months later. Four hundred and twenty seven (427) days after the petition was filed, the union was certified.

To be fair, some of the delay – after the recommended decision issued – was due to vacancies at the Board. However, the Decision of the Administrative Law Judge was issued 162 days (more than 5 months) after the petition was filed. While not as dramatic as 427 days, it is still completely unacceptable if employees are entitled to timely free choice.

The proposed rules, in addition to requiring the employer to commit to a position in writing, regarding the service writers, would have reduced the time it took from the filing of the petition until the election. If the employer had retreated from its position regarding the service writers prior to the opening of the hearing, the remaining disputed positions would have voted subject to challenge and the challenges would have been resolved through the post-election hearing. The post-election hearing would have been scheduled for fourteen days after the tally of ballots, on consecutive days – not 34 and 44 days later. The Board would have had the discretion to deny review of the decision regarding the challenged ballots.

The proposed rules will unquestionably reduce the number of days between the filing of a petition and an election, and provide more fairness and certainty to the process.

For a short window in 2012, aspects of the proposed rules and the Acting General Counsel's Guidance Memorandum regarding election procedures were in place, because they had been adopted earlier that year by the Board (before being stayed due to a court challenge to the rules).[4] During that time, I filed a petition for a client. The only dispute between the parties was the time and date of the election. The Regional Director refused to open a hearing. Instead, the morning when the hearing would have been held, the Region informed the parties that in the absence of an agreement between the parties, it would set the date and time of the election without input from the parties. The parties reached an agreement. The Union waived the right to have the *Excelsior* List for a full ten days. The election was held 24 days after the petition was filed. The Employer was not denied its full opportunity to run an anti-union campaign -- in fact, the employer's campaign started before the petition was even filed. This experience

[4] Memorandum GC 12-04 (April 26, 2012) [Subject: Guidance Memorandum on Representation Case Procedure Changes].

gives us an indication of how the system will work under the Board's proposed new rules – less unnecessary delay, less gamesmanship, and more timely elections.

Some of the proposed rules are basic modernization of an old statute. Since the 1960s, employers have been required to provide the names and home addresses of employees in proposed bargaining units to the Region under the *Excelsior* List rule. The Region then provides a copy to the Union. In nearly all cases, the list is produced on an electronic spread sheet. Presumably the same electronic record would include other accessible data such as phone numbers and email addresses. Frequently, the list contains PO Boxes in lieu of home addresses. Some employers provide street addresses and omit apartment numbers or other information necessary to locate the worker even though the employer has the information available in electronic format.

Since the 1960s, communication has changed. Almost all employees have a cell phone, email address or both. Almost all employers maintain computer systems for processing payroll. Under the Fair Labor Standards Act, the paystubs provided to employees are required to include the employee's home address. This confirms that employers already have employee contact information in an electronic format. There is no practical reason why the employer should not produce the electronic document directly to the Region and the Union. Modern business depends on electronic delivery of information and this basic tenet should apply to eligibility lists as well.

Some opponents of the Board's proposed rules have expressed concern that providing email addresses and phone numbers is more intrusive on employee privacy than the current standard of producing home addresses. This does not make sense. We all choose when to read our emails, when to respond, and most importantly, when to delete. The same is true of phone calls and voicemail. I would anticipate that in many cases, the union will use less intrusive means to communicate with employees in the bargaining unit if the *Excelsior* List requirement is expanded to require employers to provide email addresses and phone numbers.

In my experience, incomplete addresses or PO Boxes are routinely provided, thwarting the intent of the *Excelsior* list requirement. The list does not provide the Union with information allowing for contact outside of the employer's premises. For some groups of employees, including employees who work in multiple locations throughout the year, they use only a PO Box for mail. Even if seasonal, their employer contacts them in the off season to recall them to work using the cell phone numbers that are already gathered by the employer. Providing this information is no more intrusive than providing a home address.

In conclusion, these rules are not revolutionary or radically different than the status quo. They reflect an attempt to standardize some of the best practices and create consistency between Regions. Many of the proposed changes attempt to align the Board procedures to procedures used by other agencies, bring the process into the 21st century and provide clear notice. The proposed rules reduce unnecessary delay, simplify the procedure and permit the parties to seek Board review after the election at which time the parties know which, if any, differences of opinion that existed prior to the election are relevant

or determinative. This saves time and money for employers, unions and the government, and promotes the ability of employees to exercise their right to vote.

I would be happy to answer questions and I hope that my experience with the Board's procedures is helpful to this Committee.

2/755019

Chairman KLINE. Mr. Messenger you are recognized for five minutes.

STATEMENT OF WILLIAM MESSENGER, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., SPRINGFIELD, VIRGINIA

Mr. MESSENGER. Thank you. Chairman Kline, Ranking Member Miller, and distinguished representatives. Thank you for the opportunity today to testify on the NLRB's proposed ambush election rule.

While the proposed rule has many flaws, which are detailed in my written statement to the committee, I would like to focus on just two in my opening remarks: They diminish the ability of employees to make a free and informed choice as to whether to unionize, and they infringe on employee privacy interests.

First, the very purpose of a board election is to allow employees to make a free and informed choice on whether they wish to desire to unionize or not unionize. But the primary effect of this rule will be to significantly shorten the election period between the filing of an election petition and the election itself down to as little as 10 days. This will necessarily impair the ability of employees to educate themselves about the pros and cons of unionization before being forced to take a very important vote.

The shortened timeframe will also impair the ability of employees opposed to unionization to campaign themselves against the union, which is their legal right under the *National Labor Relations Act.* A union will obviously be fully prepared for an organizing campaign before it springs an election on a workplace. Employees, however, may be caught flatfooted and unable to counter-organize and put out their opposing messages.

For example, members of this committee are obviously no strangers to election. But imagine if, instead of a regularly scheduled election, any rival for your seat could simply spring an election at any time if they get a significant number of signatures and that election would be conducted in two to three weeks after it is requested. That would not only be unfair to you as candidates in being able to get your message out before the vote, but more importantly, it would be unfair to voters, who wouldn't have enough time to hear both sides of the issue before deciding who would represent them. That is effectively what the NLRB wants to impose on individual employees.

And then second, the proposed rule contemplates a serious invasion of employees' personal privacy. It requires the disclosure to the union and thus to the union's supporters and agents personal email addresses, personal phone numbers and the employees' works schedules (*i.e.,* when they get off work and when they go to work), and this information is ripe for abuse, both deliberative abuses and also unintentional abuses.

First, of course, this information will be deliberately used by unions to contacts individuals who have expressed no interest in being solicited by the union or who, for that matter, may be strongly opposed to the union. In fact, that is the very purpose of these disclosures, to allow unions to contact individuals who have expressed no interest in talking to the union. And then, after the

election is over, nothing requires that the union give the lists back to the NLRB nor could it effectively be required. The list is then in the union's hands to be able to be used as they wish, perhaps for political purposes or to disseminate to their political allies or for any other purpose unrelated to the election.

But perhaps even worse is the unintentional abuses that could happen from these disclosures. The union will necessarily have to share this information with its agents and supporters in order to use it in an organizing campaign. And then how those individuals use it, it can be misused for wrongful purposes. For example, individual union supporters, either with or without the union's knowledge, could use this information to harass individuals who oppose the union, such as late night phone calls or email spam or perhaps to simply harass individuals against whom they have a personal grudge.

The disclosures will facilitate property crime because the disclosures will include the individual's work schedules, and obviously, if someone knows when you are at work, they also know when you are not at home. And perhaps most obviously of all, these disclosures will facilitate identity theft, which is a growing problem in this Nation, because again, the union or any of its supporters who can gain obtain access to this information will have enough information to sign individuals up for things. A good example is Patricia Pelletier, who CWA officials, in retaliation for attempting to decertify the union, signed her up for hundreds of unwanted magazine subscriptions that she then had to go through the process of trying to cancel one by one.

And there is unfortunately no way to stop these abuses from occurring, once the information is given to the union. The NLRB has no effective way to police how the union will actually use this information, what safeguards are put on it and how it is disseminated for others. And, as mentioned before, once the information is given out, it can't be taken back. The bell cannot be unrung.

For this reason, the only solution to protect employees' personal privacy is for the NLRB not to require the disclosure of personal information to the unions in the first place.

Thank you for the opportunity to testify today. I move that my written statement be included in the record, and I look forward to any questions you may have.

Chairman KLINE. Thank you.

[The statement of Mr. Messenger follows:]

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March 2, 2014

The Honorable John Kline, Chairman
U.S. House of Representatives
Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515

Re: Written Statement of William L. Messenger

Dear Chairman Kline.

Thank you for the opportunity to testify before the Committee on Education and the Workforce regarding the Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule. Please accept the following as my written statement for inclusion in the hearing record: the comments of the National Right to Work Legal Defense Foundation in opposing the NLRB's proposed rule.

Sincerely,

/s/ William L. Messenger
William L. Messenger

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August 18, 2011

Via Electronic Filing

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Comments of the National Right to Work Legal Defense Foundation Regarding Proposed Amendments to the Board's Rules Governing Representation Case Procedures (76 Fed. Reg. 36,812; RIN 3142-AA08)

Dear Mr. Heltzer:

Please accept the following comments of the National Right to Work Legal Defense Foundation regarding the National Labor Relations Board's proposed amendments to its rules governing representation case procedures, 76 Fed. Reg. 36,812 (June 22, 2011) (RIN 3142-AA08).

The Foundation is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. Foundation attorneys represent individual employees in cases involving both representation and decertification elections, as well as in cases involving employees' right to hold a deauthorization election to rescind the compulsory unionism clauses governing their employment. Cases in which Foundation attorneys are or have been involved include *Rite Aid/Lamons Gasket*, 355 N.L.R.B. No. 157 (Aug. 27, 2010); *Saint-Gobain Abrasives*, 342 N.L.R.B. 434 (2004); *Covenant Aviation Security*, 349 N.L.R.B. 699 (2007); *Albertson's/Max Food Warehouse*, 329 N.L.R.B. 410 (1999). Among many other important cases litigated before this Board, Foundation attorneys secured employees' right to demand a secret-ballot election as a means of challenging suspect card-check recognitions in *Dana Corp.*, 351 N.L.R.B. 534 (2007).

The Foundation strongly opposes the proposed rules because:

(1) the shortened time-frame for representation elections will adversely affect the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampers the ability of employees opposed to union representation to organize themselves in opposition to unions;

(2) the providing of employees' personal contact information—to include their phone numbers, email addresses, and work times—to a union, and thus potentially to their co-workers and other individuals with whom the union shares its information, invades employees' right to privacy and places them in danger of harassment or worse; and

(3) the Board not determining the proper scope and composition of a bargaining unit if less than 20% of the unit sought by a union is disputed conflicts with § 9 of the Act.

The Foundation further proposes two amendments to the Board's representation procedures, which should be adopted as common sense reforms even if the proposed rules are not adopted:

(1) the Board's so-called "blocking charge" policy should be repealed so that any allegations of unfair labor practices are resolved post-election, to end the routine union tactic of using frivolous unfair labor practice charges to delay employee votes when the union fears that it may lose the vote; and

(2) the Board should eliminate the ability of petitioners to withdraw election petitions after they are filed. The Board should always conduct an election after a proper election petition is filed, to end the routine union tactic of calling off or delaying secret-ballot elections when a union fears that it may lose the election that it requested.

I. Although Section 7 Equally Protects Employees' Right to Join or Oppose a Union, the Proposed Rule Unduly Restricts the Ability of Employees to Learn About the Union and Oppose Unionization If They So Choose.

The proposed rules' chief purpose is to shorten the time frame from the filing of a petition to the date on which an election is conducted. Under the proposed rules, elections will be conducted in approximately 10-21 days, as compared to the recent median time frame of 38 days from the filing of the petition. 76 Fed. Reg. at 36,831 (Hayes, dissenting). This shortened time-frame will adversely affect the right of employees to educate themselves about the merits or demerits of monopoly union representation and, if they choose, to organize themselves in opposition to the union.

The Supreme Court recently recognized that the NLRA grants employees an implicit "right to receive information opposing unionization." *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008). Indeed, in enacting Sections 7 and 8(c) of the NLRA, Congress intended to foster "'uninhibited, robust, and wide-open debate'" regarding unionization. *Id.* (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). In other words:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.

Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967); *see NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971).

The proposed rules are deliberately calculated to minimize the time that employees have to receive information from their employer and elsewhere about the potential drawbacks of monopoly union representation, and thus make an informed choice to accept or reject unionization. Because the union initiates an organizing campaign and controls the timing of the filing of the election petition, employees will doubtlessly be fully exposed to union blandishments and propaganda. Unions will have their literature and talking points prepared and disseminated in advance of requesting any election. But employees will have little opportunity to hear opposing viewpoints.

The result is a less-informed electorate, as employees will be unable to fully educate themselves about unionization before being forced to vote on the issue. *See, e.g., Healthcare Ass'n v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006) ("It is difficult, if not impossible to see, however, how an employee could intelligently exercise such [§ 7] rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly[,] hindering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes.").

Moreover, those who oppose unionization will have insufficient time to organize themselves in opposition to the union and share their beliefs with their co-workers. This grossly tilts the playing field in the union's favor in representation elections, as a union requesting a certification election will certainly prepare and organize itself well in advance of the time that it files an election petition with the Board. The short time frame under the proposed rules will make it extremely difficult, if not impossible, for individual employees opposed to unionization to organize against a union's well-funded and professionally orchestrated campaign to win the monopoly bargaining privilege.

In short, the Board majority threatens to turn the Act's policies on their head by devising rules that place union officials' self-interests above employees' statutory right to make a fully informed choice regarding unionization. "By its plain terms . . . the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." *Lechmere v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original). "[W]hat the statute was enacted to accomplish was to protect not the rights of unions to obtain representation contracts but the rights of employees to be represented by a

bargaining agent of their own choosing." *NLRB v. Red Arrow Freight Lines*, 193 F.2d 979, 981 (5th Cir. 1952). The proposed rules fly in the face of these principles, and thus must be withdrawn.

II. Providing Employees' Personal Information to Unions and, Thus, Their Supporters Invades Employees' Privacy and Places Them in Danger.

The proposed rules require employers to give a petitioning union, within two-days after an election is directed, an electronic list of all employees' telephone numbers, email addresses, work shifts, classifications, and locations. This will be a gross invasion of employees' privacy that subjects employees to the danger of harassment or worse from union agents or supporters.

A. *The Contemplated Disclosure of Employees' Personal Information to Unions Violates Employees' Right to Personal Privacy*

1. Most employees would be appalled to learn that a government agency is contemplating compulsory disclosure of their personal information to a private special interest group *for the purpose* of making it easier for that group to cajole, induce or harass them to support its agenda. Over 93% of private sector employees have chosen not to associate themselves with unions.[1] Only a minority of Americans have favorable views of unions.[2] Many, if not most, Americans do not support the far left-wing agenda that union officials aggressively advance.[3] For this agency of the Obama Administration to compel disclosure of individuals' personal information to these unpopular and politicized special interest groups is indefensible, and functionally no different than the Administration requiring disclosure of citizens' information to ACORN or Greenpeace so as to facilitate their abilities to advance their narrow agendas.

Indeed, the contemplated disclosures run contrary to federal efforts to protect the privacy of citizens' personal phone numbers and email addresses. In 2003, Congress enacted the Do-Not-Call Implementation Act, Public Law No. 108-10, 15 U.S.C. § 6101 *et. seq.*, pursuant to which the

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[1] *See* Dept. of Labor, Bureau of Labor Statistics Economic News Release, *Union Member Summary*, USDL-11-0063 (Jan. 21, 2011) (6.9% of private sector employees were union members in 2010) (available at http://www.bls.gov/news.release/union2.nr0.htm).

[2] *See* Pew Research Poll (Feb. 17, 2011) (unions viewed favorably by 47% of public, unfavorably by 39%) (http://people-press.org/2011/03/03/section-4-opinions-of-labor-unions/).

[3] *See, e.g.*, http://www.teachersunionexposed.com/dues.cfm ("When teachers were given the chance to opt out of paying for the political causes of education unions, the number of teachers participating in Utah dropped from 68 percent to 6.8 percent, and the number of represented teachers contributing in Washington dropped from 82 percent to 6 percent.").

Federal Trade Commission and Federal Communication Commissions' created a national "Do Not Call" registry to allow citizens to opt out of unwanted telemarketing solicitations.[4] In the same year, Congress also enacted the CAN-SPAM Act, Public Law No. 108-187, 15 U.S.C. § 7701 *et seq.*, to protect individuals from receiving unsolicited email communications.

Notably, the disclosure of employees' personal information will occur absent any stated intent or desire whatsoever by these employees to make their home phone numbers, email addresses, and work times available to a union. Indeed, the compelled disclosure will occur even if the employees strongly object to the disclosure, because there is no opt-out mechanism in the proposed rules. Nor could there realistically be such an opt-out considering the extremely short time frame in which the employer must give up the employees' information. Thus, employees who might have qualms about a union obtaining their phone numbers and personal email addresses, and learning where and when they work—and this would include most sensible employees given some unions' long association with violence and intimidation—would have no way to protect their privacy.

2. The proposed rules purport to limit the contemplated invasion of employees' privacy by requiring that unions can only use employees' personal information for "purposes related to the representation proceeding and related Board proceedings." 76 Fed. Reg. at 36,838. This ostensible restriction is both meaningless and unenforceable.

First and foremost, the restriction does nothing to stop the intended invasion of employees' privacy—*i.e.*, union operatives and supporters calling and emailing employees, tracking their movements to and from work, and visiting their homes to cajole or coerce them to support the union in an election (or to secure enough authorization cards to allow a "card check" and thereby avoid an election). Employees who take measures to protect their personal privacy—such as by not listing their telephone numbers or limiting with whom they share their email addresses—will find their attempts at privacy upended by the compulsory disclosure of detailed personal information to an outside third-party—one that the employees may vehemently oppose.

Second, the phrase "related to the representation proceeding and related Board proceedings" is as vague as it is broad. It could be interpreted to include *any* union use of information that regards concerted activity under the Act, as *all* such activities could potentially result in a "Board proceeding." This includes using the information to drum up unfair labor practice charges against the employer, which is a common tactic in union corporate campaigns.[5] The information could also be used by a union to obtain voluntary recognition from the employer, which could result in unfair

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[4] *See, e.g.*, http://www.ftc.gov/bcp/edu/microsites/donotcall/index.html *and* https://www.donotcall.gov.

[5] *See, e.g.*, *Pichler v. UNITE*, 542 F.3d 380, 383-84, 395-86 (3d Cir. 2008).

labor practice proceedings or a *Dana* election proceeding (unless the current Board majority overrules that decision).

Third, the proposed restriction is unenforceable as a practical matter. How will the Board or anyone else be able to determine exactly how a union uses employees' personal information? How would the Board enforce this restriction? Through a feckless unfair labor practice prosecution? And what sanctions could it realistically levy for misuse of the information? Absent the unusual circumstance of an internal union whistle blower or an odd happenstance, it will be impossible to determine how the union used the information and with whom it shared that information. Thus, it will be impossible to effectively sanction such a miscreant union or one of its rogue supporters.

One need not look far to see that union officials are predisposed to ignore any restriction placed on their use of employees' personal information. Union indifference to employees' privacy rights is exemplified by the recent conduct of UNITE officials. The Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq.*, makes it a federal crime for any person knowingly to obtain or disclose personal information from a motor vehicle record, subject to certain limited exemptions. Yet, even this prohibition did not deter UNITE from not once, *but twice*, engaging in systematic and widespread efforts to obtain employees' personal information by covertly copying their license plate numbers and illicitly accessing their motor vehicle records. *See Pichler v. UNITE*, 446 F. Supp. 2d 353, *judgment modified*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), *aff'd*, 542 F.3d 380 (3d Cir. 2008); *Tarkington v. Hanson & UNITE*, Docket No. 4-00-CV-00525 (E.D. Ark. 2000). Considering that unions such as UNITE are willing to blatantly disregard federal statutes that prescribe criminal penalties and significant liquidated damages in order to obtain and use personal information about employees, the notion that unions will refrain from misusing employees personal information based on whatever paltry sanctions the Board majority postulates borders on the laughable.

B. *The Contemplated Disclosures Will Place Employees in Personal Danger from Individuals with Whom a Union Shares Their Personal Information*

1. Even worse than the danger that arises from union use of employees' personal information is the danger posed to employees by misuse of the information by individuals with whom the union shares their information. In election campaigns, unions operate through their agents and supporters. This often includes individuals who are employed at the workplace targeted for unionization. Given that the Board majority's purpose for forcing employers to provide unions with employees' personal information is to facilitate union contact with employees, *see* 76 Fed. Reg. at 36,820, it is both intended and foreseeable that unions will share employees' personal information with their agents and supporters, including the employees' co-workers who support unionization.

Once a union shares employees' personal information with its supporters, those individuals can and likely will misuse this information to the detriment of the employees. The potential for harassment, unwanted sexual advances, identity theft, and property crime are readily apparent.

Harassment. Militant union supporters could easily use personal information to retaliate against individuals who dare oppose the union that they support— incessant and late night phone calls, threatening emails, using the email addresses to sign employees up for spam or malware, and the theft or destruction of their property when they are not at home. For example, UPS employee Rod Carter began to receive threatening late night phone calls following his opposition to a strike by the Teamsters, and was ultimately stabbed with an ice pick by Teamsters militants who tracked his driving route.[6] Of course, union supporters can also use employees' personal information to harass those against whom they have a personal grudge.

Such harassment can occur both with and without the union's knowledge. It can also continue long after the election proceeding ends, for a union has no way to fully retrieve the information that it shares with its supporters (who can simply copy it).

Sexual Harassment. It is unlikely that women in many workplaces will feel comfortable knowing that their personal email addresses, telephone numbers, and when they get off work will be made known to any co-worker or stranger who supports the union's campaign. These individuals can plainly misuse that information to make unwanted sexual advances, and to stalk those who refuse their advances. Indeed, with current technology, an individual's physical movements can even be tracked via their cell phone if their cell number is known.[7]

Sexual harassment is already a well-recognized problem within the workplace. Facilitating the spread of employees' personal information amongst the workforce, as the Board's proposed rule will, can only serve to exacerbate the problem.

Identity theft. A certain result of the Board compelling the disclosure of electronic lists of employees' personal information is identity theft. This is the fastest growing white collar crime in

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[6] *See* http://articles.latimes.com/2001/apr/13/business/fi-50418, last accessed July 14, 2011.

[7] *See* Justin Scheck, *Stalkers Exploit Cell Phone GPS*, WALL STREET JOURNAL (Aug. 3, 2010) ("researchers with iSec Partners, a cyber-security firm, described in a report how anyone could track a phone within a tight radius. All that is required is the target person's cellphone number, a computer and some knowledge of how cellular networks work . . . .") (available at http://online.wsj.com/article/SB10001424052748703467304575383522318244234.html).

the country, and can exact devastating harms on its victims.[8] An electronic list that contain dozens or hundreds of employees' names, addresses, phone numbers, email accounts, employers, and job descriptions is tailor-made for identity theft.

For example, agents of Communication Workers of America Local 1103 in Connecticut recently used personal information that they attained about Patricia Pelletier to sign her up for hundreds of unsolicited and unwanted magazines and consumer products in retaliation for her petitioning for a decertification election.[9] Not only was Pelletier forced to spend several hours each day canceling individual subscriptions and products, but she was billed for thousands of dollars by unwitting marketers and publishing companies, jeopardizing her credit rating and causing her severe emotional distress. With access to employees' detailed personal information, union militants can easily subject other employees to the same or similar types of retaliatory harassment.

Equally dangerous is the identity theft that will occur without the union's knowledge. Because unions cannot control how their agents and supporters will use the personal information provided to them, they cannot prevent their supporters from innocently or inadvertently sharing the information with others who may have wrongful inclinations.

Property Crime. Providing information regarding employees' work schedules and shifts also will facilitate the theft of employees' property and the burglary of their homes. To know when someone is at work is to know when they are not at home, and thus leaves them susceptible to home invasion. If the proposed rule goes into effect, any union agent or supporter—or anyone with whom the agent or supporter shares the information—will gain knowledge of employees' home addresses and times when they are not at home.

2. There is no rule or restriction that the Board can impose on unions to eliminate these dangers to employees' well-being, because they can and will occur without the union's intent or knowledge. The dangers are inherent in the union sharing employees' personal information with its agents, supporters and employees' co-workers—which is the inevitable and intended result of the disclosures. Once a union shares employees' personal information with its supporters, the union: (1) cannot control how these individuals will use the information; (2) cannot control with whom they

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[8] *See, e.g.*, Nick K. Elgie, *The Identity Theft Cat-and-mouse Game: an Examination of the State and Federal Governments' Latest Maneuvers,* 4 I/S: J. L. & Pol'y for Info. Soc'y 621, 622-23 (2008).

[9] *See Patricia Pelletier v. CWA, Local 1103*, Case No. Cv-08-5021589-S (Conn. Sup. Ct. 2010); *CWA Communications Workers of America & Its Local 1103 (Connecticut Student Loan Foundation)*, N.L.R.B. Case No. 34-CB-3017.

will share the information; and (3) cannot take the information back if it is misused or after the organizing campaign ends. The "cat" is forever out of the proverbial "bag."

For example, assume that a union shares employees' addresses, phone numbers, email addresses, and work times with several of its supporters. Even if the union shared the information solely to facilitate its organizing campaign, the end result is the same—employees' personal information is now in the hands of individuals who may have their own agendas. These individuals can use this information to stalk a co-worker or engage in identity theft. Even if the union supporters are not themselves miscreants—their associates or teenage child who likes to hack computers may be a different story.

In sum, the only way to protect employees' privacy and safety in the first place is not to compel disclosure of their personal information to unions. Employees' privacy and safety must come before union self-interests in acquiring more dues-paying members.

III. Not Determining the Proper Scope of a Bargaining Unit If Less Than 20% of the Unit Sought by a Union Is Disputed Conflicts with § 9 of the Act.

The proposed rules require that the proper scope of a bargaining unit not be determined before an election if less than 20% of the proposed unit is in dispute. 76 Fed. Reg. at 36,823-36,824. Instead, an election is to be conducted with the disputed employees voting subject to challenge. *Id.* The dispute regarding the proper scope of the unit is to resolved only if the challenged votes affect the election's outcome. *Id.* If the union wins the election irrespective of the challenged votes, the Board will certify the union as the representative of a bargaining unit that includes the disputed employee classifications without determining whether that unit is appropriate. *Id.* at 36,824. This proposal violates the statutory requirements of § 9 of the Act in at least two respects.

First, the Board cannot determine whether there is a question concerning representation under § 9(c)(1) without knowing the size and composition of the bargaining unit. Section 9(c)(1) requires that, after a petition is filed

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1). The Board has long required a showing of interest signed by at least 30% of the employees in a bargaining unit to support an election petition. *See* Casehandling Manual (Representation), Sections 11020-11042.

Obviously, the Board cannot determine if 30% of a bargaining unit desires an election if it does not first determine how many employees are in the unit. For example, assume that a union petitions for an election in a unit that it alleges contains 100 employees based on showing of interest signed by 31 employees. The employer contends that a proper unit contains 118 employees. If the employer is correct, the union lacks the 30% showing necessary to establish a question concerning representation. Nevertheless, under the proposed rules, the Region will not resolve the dispute because the 18 disputed employees are less than 20% of the unit. Rather, it will direct an election without first determining if a question concerning representation exists, as § 9(c)(1) requires, and the faulty showing of interest will never be rectified. In effect, the Board now proposes to lower the threshold for a showing of interest for certification elections to less than the traditional 30%.

Indeed, if these proposed rules come into effect, unions will deliberately seek to exploit them in the manner described above. If a union lacks the necessary 30% showing of interest to properly obtain an election, it can simply file a petition for a unit that is 20% smaller, no matter how glaringly inappropriate the proposed unit. When the employer asserts that the unit is inappropriate and under-inclusive, the Region will never bother to determine if there exists an adequate 30% showing of interest or a true question concerning representation. Instead, it will mindlessly direct an election in the ersatz unit.

Second, § 9(b) of the Act requires that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). But under the proposed rules, if less than 20% of the bargaining is in dispute, the Board will *not* determine the unit appropriate for collective bargaining if the union wins an election by a margin that makes the votes of employees in the disputed portions of the unit irrelevant to the electoral outcome. Instead, the Board will blindly certify the union as the representative of a unit that includes the disputed employee classifications, without ever determining if those classifications are properly part of the unit. The Board majority's comments to the proposed rules expressly contemplate this result:

> If, on the other hand, a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.

76 Fed. Reg. at 36,824.

For example, assume that a union petitions for an election in an asserted unit with three job classifications and 118 employees. The employer contends that the unit is improper because one job classification that contains 18 individuals consists of supervisors. Under the proposed rule, the Board will conduct the election without resolving the "scope of the unit" issue because it concerns less than 20% of the unit. If the union wins the election by a margin that renders the votes of the 18 disputed-individuals irrelevant to the electoral outcome, the Board will blindly certify the union as the exclusive representative of all three job classifications—to include the 18 individuals who might be supervisors —without ever resolving if that unit is proper.

The Board majority's deliberate refusal to determine the proper scope of the unit in this circumstance is plainly inconsistent with not only § 9(b), but also § 9(a).[10] Indeed, both Supreme Court[11] and Board[12] precedent are clear that a precisely defined "bargaining unit" is at the heart of the Act's structure. Nowhere in the NLRA's text or history is there any evidence that Congress wished to permit an erroneous class of workers (equaling up to 20%) to be included in a bargaining unit even if those workers have no real connection to the unit. "[T]he Board's powers in respect of unit determinations are not without limits, and if its decision 'oversteps the law' it must be reversed." *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 171-2 (1971) (citations omitted).

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[10] Section 9(a) provides that only "representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 29 U.S.C. § 159(a) (emphasis added).

[11] *See, e.g., NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) ("Section 9(b) of the Act vests in the Board authority to determine 'the unit appropriate for the purposes of collective bargaining.' . . . . The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a 'community of interest.' A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." (citations omitted)).

[12] *See, e.g., Chester Valley, Inc.*, 251 N.L.R.B. 1435, 1450 (1980) ("Because of this substantial deviation between the appropriate unit and the unit specified in the . . . bargaining demand, that demand was not a proper request to bargain."); *Motown Record Corp.*, 197 N.L.R.B. 1255, 1261 (1972) ("In order to impose a bargaining duty upon an employer, the union's demand should clearly define the unit for which recognition is sought.").

The Board's proposed "20%-is-close-enough" rule also demonstrates a callous disregard for the rights of the individuals within the disputed portions of the unit. The Board majority will subject these persons to monopoly union representation (and, likely, forced union dues obligations), without bothering to determine if they share a community of interest with the rest of the unit, or even if they are statutory employees.

The Board's intended refusal to determine a proper bargaining unit when the votes of the disputed portions do not affect an election will provide unions with a strong incentive to file petitions that encompass supervisors and/or inappropriate job classifications because it presents them with a "no lose" situation. Consider the three possible outcomes of this gambit under the proposed rules:

(1) If the union wins the election irrespective of the challenged votes, it benefits because it will become the exclusive representative of supervisors and/or inappropriate job classifications, as the Board will never determine the proper scope of the unit.

(2) If the union loses the election irrespective of the challenged votes, then the union is no worse off, as it would have lost the election amongst a proper unit anyway.

(3) If the union will win the election if some or all challenged votes are not counted, then the union can simply change its position and concede that those supervisors or inappropriately classified workers whose votes stand in the way of its certification are not part of the unit.

As is readily apparent, the proposed rules give unions every incentive to abuse the representation process, game the system, and make repeated attempts at becoming the exclusive representative of individuals who would not be considered part of a proper bargaining unit if the Board actually adjudicated the issue.

Overall, the Board majority seeks to enshrine in its rules the principle that being up to 20% wrong is "close enough for government work" when determining whether there is a question concerning representation and whether a bargaining unit is appropriate under the Act. But this huge margin of error is not "close enough" under NLRA § 9. Indeed, the courts have consistently refused to enforce Board orders when there is an appreciable difference between the scope of the unit during the election and that ultimately certified. *See, e.g., NLRB v. Beverly Health & Rehab. Servs.*, 120 F.3d 262 (4th Cir. 1997) (unpublished) (unit differed by 20%); *Nightingale Oil Co. v. NLRB*, 905 F.2d 528, 531 (1st Cir.1990) (units differed by 10%); *NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 506-08 (2d Cir.1986) (units differed by 10%); *cf. NLRB v. Lorimar Prods.*, 771 F.2d 1294 (9th

Cir.1985) (units differed by a third); *Hamilton Test Sys. v. NLRB*, 743 F.2d 136 (2d Cir.1984) (units differed by more than half).[13]

In sum, Congress enacted § 9 of the Act to give the Board a clear duty to determine whether a question concerning representation exists, as well as a clear duty to determine with precision the size and composition of a proper bargaining unit. The Board cannot neglect its duties and declare that anything within a 20% margin of error is "close enough for government work," thereby rushing elections for the sole benefit of union officials seeking more compelled dues payors.

IV. The Board's "Blocking Charge" Policy, Which Allows Unions to "Game The System" in Decertification Cases, Must be Eliminated.

The Board majority claims the proposed rules are justified because of the need to "eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results." 76 Fed. Reg. at 36,817. The Board also justifies pushing many current pre-election issues to post-election hearings because "Congress did not intend the hearing to be used by any party to delay the conduct of the election." *Id.* at 36,822. To the extent that these rationales have any validity, then the Board's blocking charge policy must also be eliminated, because it provides unions with an unfettered license to "game the system" and interminably block and delay decertification elections by raising issues that are better left to post-election challenges. Congress clearly did not intend for this result, since it did not legislate "blocks" to elections. Rather, the Board has created such "blocks" in its own discretion.

The Foundation, therefore, proposes that the Board's blocking charge policy be eliminated, and that all decertification elections should go forward and the ballots be counted notwithstanding any previous or contemporaneous unfair labor practice charges. Any allegations in such charges can and should be litigated as post-election challenges/objections. In no case should unfair labor practice charges be allowed to block or delay a decertification election sought by employees. Moreover, ballots should not be impounded because of such charges.

The Foundation's staff attorneys know from decades of personal experience that the first reaction of almost every union facing a decertification petition is to spend .44 cents and mail to the Regional office a "blocking charge," no matter how frivolous. How could it be any other way, because every

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[13] These cases are not distinguished by the Board majority's assertion that, under the proposed rules, employees would not be misled as to the proper scope of the unit because the disputed employee classifications would be voting subject to challenge, 76 Fed. Reg. at 36,824. This does not change the fact that the Board will not actually determine whether the disputed employee classifications are properly within the bargaining unit unless those votes are actually challenged as affecting the electoral outcome.

incumbent (whether a union or politician) wants to remain in power and will do whatever is necessary to block or delay the day of electoral reckoning. We ask the Board to review its own statistics and determine the percentage of decertification elections that are subject to a blocking charge or similar delay. We expect the number to be astronomically high given our experience with unions routinely "gaming the system" to block and delay such elections.

The Board's Casehandling Manual Section 11730 states laudably that "it should be recognized that the [blocking charge] policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition." However, the blocking charge policy is consistently misused by unions for just this purpose. This abuse of the process occurs regularly and has been going on for decades. We ask the Board to take administrative notice of the record in just a few recent or currently pending cases, which are examples of the misuse:

(1) *Metal Technologies, Inc., United Steelworkers Local 2-232, and Pamela J. Wichman (Employee)*, Case No. 30-RD-1526: The decertification petition was filed on November 17, 2010, but blocked until June 2011 by unfair labor practice case 30-CA-18806 (filed by the union on November 23, 2010, just 6 days after the petition). The election *may* occur in August 2011, if no more blocking charges are filed.

(2) *Scott Brothers Dairy/Chino Valley Dairy Products, Teamsters Local 63, and Chris Hastings (Petitioner)*, Case No. 31-RD-1611: The union has filed a long series of unsuccessful unfair labor practice charges, including 31-CA-29944, in an effort to stall the election. The election was held in May 2011, but the ballots remain impounded by additional charges. The union consequently remains as bargaining agent despite grave doubts as to its majority status.

(3) *Cortina's Painting, International Union of Painters & Allied Trades District Council 5 ("IUPAT"), and Sergio Martinez Santos (Petitioner)*, Case No. 19-RD-3890: This decertification petition was filed on March 2, 2011. IUPAT has blocked two previously scheduled elections by filing a series of unfair labor practice charges against Cortina's Painting, the latest in June. An election has again been scheduled for August 19. In all, union blocking charges have delayed an election for almost six months despite clear evidence that a majority of the employees no longer support the union.

(4) *SEIU District 1199, Community Support Services, and Susan Ritz (Petitioner)*, Case No. 8-RD-02179. This decertification petition was filed in February 2010 (after a prior one in 2008 was blocked), but no election was held until February 2011 due to additional blocking charges.

These are just a few examples of unions' misuse and abuse of the blocking charge policy. The Board has recognized that such "blocking charges" serve to deny employees their fundamental § 7 rights. *See Saint-Gobain Abrasives*, 342 N.L.R.B. 434 (2004). Nonetheless, in practice the Board

routinely imposes such "blocks," forgetting that the Act's fundamental and overriding principle is employee free-choice and "voluntary unionism," not the entrenchment of incumbent union officials. Because any "bar" to a decertification election deprives employees of rights expressly granted to them under the Act, *see* §§ 7 and 9(c)(1)(A)(ii), all such "bars" should be strictly and narrowly construed. *See Saint-Gobain Abrasives*; *Waste Management of Maryland*, 338 N.L.R.B. 1002 (2003) ("a finding of contract bar necessarily results in the restriction of the employees' right to freely choose a bargaining representative").

Employees enjoy a statutory right to petition for a decertification election under§ 9(c)(1)(A)(ii) of the NLRA. But that right is trampled by arbitrary "bars" or "blocking charges" which prevent the expression of true employee free choice. Indeed, most of the Board's "bars" and "blocking charge" rules stem from discretionary Board policies, which should be reevaluated when industrial conditions warrant. *See Dana Corp.*, 351 N.L.R.B. 434 (2007); *IBM Corp.*, 341 N.L.R.B. 1288 (2004). It is long past time for the Board to drastically alter, if not end, its "blocking charge" rules.

Employee free choice under § 7 is the paramount interest the NLRA is intended to advance. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act"). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *Levitz Furniture Co.*, 333 N.L.R.B. 717, 725 (2001) ("Board elections are the preferred means of testing employees' support"). This right of *employee* free choice should not be sacrificed by allowing unions to "game the system" by blocking elections with unsupported allegations that an employer committed an infraction of the law.

For this reason, the Board's "blocking charge" practice has faced severe judicial criticism. *See, e.g.*, *NLRB v. Gebhard-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968); *NLRB v. Minute Maid Corp.*, 283 F.2d 705 (5th Cir. 1960). Judge Sentelle's concurring opinion in *Lee Lumber*, 117 F.3d at 1463-64, highlights the unfairness of the Board's policy:

> As the court today notes in discussing the imposition of the bargaining order, "employee 'free choice' ... is a core principle of the [National Labor Relations] Act." (citing *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir.1996)). However, in cases like the present one, the Board, in the face of that core principle, presumes that the employees are incapable of exercising their core right because they might have been deceived as to the union's strength by the employers' apparent willingness to challenge the union. If that is the case, and a union is worth having, then why couldn't the unions so inform the employees out of it? To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case. Consider anew the facts before us. In 1990, 85.7 percent of the

> employees of the bargaining unit signed a petition asking for a chance to exercise their free choice. Seven years later, those employees still have not had the election they sought because the Board presumes that the employers' refusal for a few days to bargain with the Union thoroughly fooled those poor deluded employees to such a point that neither the Union nor anyone else could possibly educate them of the truth known only to their Big Brother, the Labor Board.

Instead of arbitrarily blocking elections and treating employees like children, the Board should conduct elections in all decertification cases without delay. Employees are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. *Id.* Even in where employers commit an unfair labor practice, the Board's "blocking charge" rules are arbitrary and anti-democratic because they halt decertification elections without regard to the desires of the employees, based upon "the sins" of the employer. *Overnite Transp. Co.*, 333 N.L.R.B. 1392, 1398 (2001) (Member Hurtgen dissenting). This does nothing but unfairly entrench incumbent unions.

In sum, the Board must end the misuse and abuse of blocking charges by NLRB Regional Offices and incumbent unions bent on clinging to power. The Board's rule should be amended to provide that unfair labor practice charges will not block an election, but instead will be considered (if deemed sufficiently meritorious by the General Counsel) in conjunction with any objections to the outcome of the election.[14]

V. The Board Should Amend Its Rules So That Petitioners Cannot Prevent the Board from Conducting Otherwise Valid Elections by Withdrawing Petitions.

When unions believe that employees will vote against them in the voting booth, they resort to a common and unsavory tactic: simply cancelling the election by withdrawing their election petitions. Roughly *one-third* of all union representation petitions are withdrawn by the union before

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[14] The Board posited nine different options concerning the current blocking charge policy. 76 Fed. Reg. at 36,827-36,828. Option Number 8, to ban blocking charges, is the best course. However, if the Board does not scrap entirely the current policy, it should at least require unions filing unfair labor practice charges in the face of an election petition to simultaneously offer proof and provide immediate access to its witnesses so the Region can expeditiously investigate the charges. In no event should the election be delayed or cancelled, or the ballots impounded, while this investigation occurs.

an election occurs.[15] This union practice of effectively "taking their ball and going home" whenever defeat is likely must be halted.

First and foremost, unions already enjoy a great electoral advantage by being able to control if and when they petition for an election. This enables unions to time the election for when they believe their support will be at its peak. It also enables unions to effectively marshal their resources and organize their campaigns. By contrast, employees and employers are in the dark about exactly when the union blow will fall upon them.

To compound this electoral advantage with the ability to unilaterally withdraw an otherwise valid election petition if the union fears defeat, and potentially re-file the petition later when conditions improve, is grossly unfair. It is akin to giving an incumbent President the ability to control not only the date of the next presidential election—which he would of course time to coincide with a favorable political environment—but also to cancel the election if the political winds unexpectedly shift against him, and then reschedule at a different more advantageous time.

Second, union withdrawal of election petitions advances neither the NLRA's core policy of effectuating employee freedom of choice, nor its subsidiary policy of improving "industrial stability." If there is a question concerning representation amongst employees under § 9 of the Act, resolving that question with an election—one way or the other—clearly advances both policies. Indeed, this is very reason for the existence of election procedures under § 9 of the Act. In contrast, not resolving a legitimate question concerning representation merely because a union fears that employees may exercise their § 7 rights to refrain from representation impairs both employee freedom of choice and industrial stability.

Finally, the Board majority should limit the ability of unions and other petitioners to withdraw valid election petitions because of the impact of some of the other proposed rules. For example, the mandatory disclosure of limited information about employees *before* an election hearing, and the mandatory disclosure of their detailed personal information two-days *after* an election hearing, dictates that unions *not* be permitted to unilaterally cancel the election after receiving this personal information. Otherwise, unions will surely engage in the loathsome tactic of petitioning for an election just to obtain private information about employees, but then withdraw the petition and use that private information to facilitate a corporate campaign against the employer or for other nefarious purposes. If unions are given automatic access to detailed personal information about employees within nine days after filing a petition—which is what the rules contemplate—it is imperative to prevent them from using that private information for purposes other than the election itself.

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[15] According to the Board's statistics, the following percentage of RC petitions were withdrawn over the past five years: 30% in 2010; 31% in 2009; 32% in 2008; 43% in 2007; 36% in 2006; and 40% in 2005. *See* http://www.N.L.R.B..gov/rc-elections-bar-chart#chart1bar.

For these reasons, the Board's regulations should be modified to effectively prohibit unions and other petitioners from withdrawing otherwise valid election petitions. The rules should provide that, when an election petition is filed, the Region *shall* determine whether a question concerning representation exists, conduct an election if such a question exists, and certify the results thereof *irrespective* of the petitioner's further participation in the process.

CONCLUSION

Under the Act, "[u]nions represent employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel*, 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting). In proposing these changes to its electoral policies, the Board majority seeks to stand this principle on its head by disadvantaging employees to satiate union self-interests. The proposed amendments to the NLRB's election rules must be rejected and the Board's blocking charge and withdrawal policies amended as described above.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

Raymond J. LaJeunesse, Jr.

RJL/wlm

Chairman KLINE. All of your written statements will be included in their entirety in the record. Thank you all for your testimony, a panel of experts here, and thank you all for paying attention to the lights. I am trying to think when last we had a panel like this that finished on time. So thank you very much.

Ms. Davis, in your testimony, you brought up the subject of what you call micro-units or micro-unions that was addressed in the Specialty Healthcare decision ruling of the NLRB back in 2011, and in that Specialty Healthcare decision, any party seeking to enlarge the unit must demonstrate employees in the large unit share, quote, "an overwhelming community of interest." And that is the change; it is the "overwhelming community of interest."

Again, to you, Ms. Davis, when does the NLRB determine the appropriateness of the bargaining unit?

Ms. DAVIS. Well, in accordance with current procedures, that happens before the election, either through agreement of the parties in a stipulated election agreement or by an election held by a hearing officer at the regional office and then a decision issued by the regional director prior to the election actually being ordered.

Chairman KLINE. And so do you see a change or a threat to that in the proposed ambush election rule?

Ms. DAVIS. Absolutely, because there will be no opportunity to litigate the appropriate bargaining unit before the election was scheduled. All issues under the proposed rules are being left until post-election, which would create a number of difficulties in terms of the representation case process for employers. Not only the breadth of the bargaining unit, which is what we are talking about under Specialty Healthcare, which groups will be included or not included, but also there are individual eligibility issues that are determined under the current processes before the election takes place; whether an individual is eligible to vote, whether that individual is a supervisor or not. It is a very important determination that needs to be made in the process because supervisors, under the *National Labor Relations Act,* are agents of the employer, and if they break any of the rules, the employer has broken the rules, which will lead to an election being overturned and possibly a separate unfair labor process.

So it is important for certainty of the process that the employer knows who is in the voting unit and who isn't; who is a supervisor and who isn't. The new rules ignore that and are going to make a complete mess out of that process.

Chairman KLINE. So you were suggesting also in your testimony that there be an extension to the comment period, as I recall. Could you explain the relationship of that suggestion for an extension of the comment period to your discussion that you just went through very thoughtfully and thoroughly with Specialty Healthcare and the definition of supervisors?

Ms. DAVIS. Yes, sir. There are a number of cases currently pending before the National Labor Relations Board about applying the Specialty Healthcare standard, which, as you can tell by its name, was a case that involved the health care industry, but now it is being applied to the retail sector.

Two cases that are pending, one involves Macy's and one is Bergdorf Goodman, one of my favorite stores, that happens to do

with salespeople, shoe salespeople, and whether or not they are an appropriate bargaining unit. For the Board to issue the decisions that are pending to give clarity to the breadth of the Specialty Healthcare decision, is it going to apply in every industry? Is it going to apply across all sorts of workforces? And for the General Counsel Griffin, who said he is going to issue specific guidelines regarding Specialty Healthcare, it would be extremely important for employers to know that before there are any changes to the representation case rules for the reasons that I outlined, that there is not going to be an opportunity to litigate these issues prior to an election being ordered.

Chairman KLINE. Okay. So this is a horse and cart essentially issue.

Ms. DAVIS. It is.

Chairman KLINE. And your position, your argument is that you need to get the clarity on the specialty ruling from the NLRB before you move to the ambush election?

Ms. DAVIS. Yes, because we need to have the parameters established of that decision and what it is going to mean across the board.

Chairman KLINE. Okay. In a probably a futile effort to set the example here, I see my light has turned to yellow, so I will yield back and recognize Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

And before I begin my questions, I would like to ask unanimous consent that the petition filed by UAW before the National Labor Relations Board be made part of this hearing.

Chairman KLINE. Without objection.

[The information follows:]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TEN

VOLKSWAGEN GROUP OF AMERICA, INC.,

Petitioner-Employer,

and Case 10-RM-121704

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Labor Organization.

OBJECTIONS TO CONDUCT AFFECTING ELECTION

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the "UAW") objects to conduct affecting the election held in this matter on February 12, 13 and 14, 2014 among the production and maintenance employees of Volkswagen Group of America, Inc. ("VWGOA") at its facility in Chattanooga, Tennessee ("the Election"). In support, the UAW states as follows, reserving its right to fully document the basis for its Objections through such investigations and evidentiary hearings as the Board determines to conduct.

1.

In the days between the filing of the Petition in this matter (hereafter "the Petition") and the conclusion of the Election, and at other times, senior officials of the State of Tennessee (the "State"), including Governor William Haslam, State House

Speaker Beth Harwell, State House Majority Leader Gerald McCormick, Senate Speaker Pro Tem Bo Watson, Chairman of the State Senate Commerce and Labor Committee Jack Johnson, and Vice-Chairman of the State Senate Commerce and Labor Committee Mark Green (collectively, the "State Officials"), conducted what appears to have been a coordinated and widely-publicized coercive campaign, in concert with their staffs and others, to deprive VWGOA workers of their federally-protected right, through the Election, to support and select the UAW as their exclusive representative under Section 9(a) of the National Labor Relations Act (the "Act"), free of coercion, intimidation, threats and interference. The State Officials' campaign included, without limitation, publicly-announced and widely disseminated threats by the State Officials that State-financed tax and other incentives and financial benefits would be withheld from VWGOA, to the detriment of VWGOA and VWGOA workers, and that other harm would come to such workers and their employer if the VWGOA workers exercised their protected right to select the UAW as their representative pursuant to Section 9(a) of the Act. Most of the statements made by the State Officials as part of this campaign centered on a threatened loss of State financial incentives for VWGOA expansion in Chattanooga if the UAW was elected. And these threats were clearly designed to influence the votes of VWGOA workers in the Election and to deprive them of their Section 7 right to vote in an atmosphere free of coercion, intimidation and interference. Thus, campaign leader State Senate Speaker Pro Tem Bo Watson explained his threats on the eve of the Election by stating that "[t]he workers that will be voting, need to know all of the potential consequences, intended and unintended, should they choose

to be represented by the United Auto Workers." Those "consequences" of UAW representation, as Watson made clear, included their employer's loss of State financial support seen by all as critical to make the Chattanooga plant viable through the introduction of a second product line (the B-SUV) in order to bring the plant to full, secure and profitable capacity utilization.

Summarizing the State Officials' threats, State Senate Speaker Pro Tem Watson sent this message to VWGOA workers: "I believe the members of the Tennessee Senate will not view unionization as in the best interest of Tennessee. The Governor, the Department of Economic and Community Development, as well as the members of this delegation, will have a difficult time convincing our colleagues to support any Volkswagen incentive package." These threats are very significant, for State financial incentives were a key component in VWGOA's decision to locate in the State and are necessarily a key component to any future VWGOA decisions regarding future expansion and full capacity utilization in Chattanooga, and to the heightened job security that would accompany such an expansion. In the Board investigation that will follow the filing of these Objections, the UAW will present the Board with a full collection of the threats against VWGOA and its workers made by the State Officials, as well as the dissemination of these threats both in the public media and directly to the VWGOA workforce. The State Officials' threats include, but are not limited to, those described in the following, selected from scores of local and national media reports in the days before and during the Election:

- "Tenn. Politicians threaten to kill VW incentives if UAW wins

election" Reported at: http://www.autonews.com/article/20140210/OEM01/140219986/tenn-politicians-threaten-to-kill-vw-incentives-if-uaw-wins-election# (Statements of Governor Haslam and House Majority Leaders Gerald McCormick re loss of VW incentives if VWGOA workers elect UAW) (See Exhibit UX1 attached hereto);

- "Tenn. Lawmakers: VW incentives threatened by UAW" Reported at http://www.businessweek.com/ap/2014-02-10/tenn-dot-lawmakers-vw-incentives-threatened-by-uaw (repeating Watson threat and quoting House Speaker Harwell regarding the effect of UAW being elected on State incentives: "It would definitely put those [incentives] in jeopardy ... That would jeopardize a very good arrangement for Volkswagen to locate here." (See Exhibit UX2 attached hereto);
- "Union Drive Doesn't Bother Management, but GOP Fumes" reported at http://www.nytimes.com/2014/02/12/business/automaker-gives-its-blessings-and-gop-its-warnings.html?_r=0 (containing more threats including Bo Watson's statement that "The members of the Tennessee Senate will not view unionization as in the best interest of Tennessee") (Exhibit UX3 attached hereto);
- "Bo Watson Says VW May Lose State Help If The UAW Is Voted In At Chattanooga Plant; McCormick Urges Workers To Reject Union" reported at http://www.chattanoogan.com/2014/2/10/269310/Bo-Watson-Says-VW-May-Lose-State-Help.aspx ; (containing more threats, including Bo Watson's statement that "[t]he workers that will be voting need to know all the potential consequences, intended and unintended, should they choose to be represented by the UAW") (Exhibit UX4 attached hereto).[1]

These and similar threats by State officials were widely disseminated in broadcast, print and social media, including on various campaign websites managed and paid for by business-supported and other groups such as "Southern Momentum," "workerfreedom.org," and "Americans for Tax Reform" and directed at VWGOA

[1] These threats by State Officials were published in scores of broadcast, print and social media outlets, including virtually all Chattanooga-area media. The UAW will provide the details of this republication to the Board during the investigation of these objections.

voters. For example, Mike Burton, a sponsor of the "No2UAW" website, speaking to his fellow VWGOA workers, promptly and publicly republished the State Officials' threats and truthfully described them for what they were: shortly after these threats were made, Burton quickly issued a press release stating: "This confirms exactly what we have been telling people ... A vote for the UAW is a vote against expansion of the plant, plain and simple." (Burton quote appears in UX1 (attached hereto).) Moreover, Burton and his supporters broadly distributed the *Chattanoogan* article entitled "Bo Watson Says VW May Lose State Help If the UAW Is Voted In At Chattanooga Plant" (Exhibit UX4) as a leaflet in the VWGOA facility immediately after its February 10 publication, two days before the Election.

The State Officials' threats were a constant presence in the minds of VWGOA voters in the period immediately before and during the Election, and were a blatant attempt to create an atmosphere of fear of harm to VWGOA employees, their jobs and the viability of their employer, all in order to influence the outcome of the election and cause VWGOA employees to vote against UAW representation out of fear. As described by a dissenting State official, the threats were "an outrageous and unprecedented effort by state officials to violate the rights of employers and workers [by] basically threatening to kill jobs if workers exercise their federally protected rights to organize." http://www.nytimes.com/2014/02/12/business/automaker-gives-its-blessings-and-gop-its-warnings.html?_r=0 (See UX3 (attached hereto).)

2.

Within hours of the February 10, 2014 press conference at which State Official

Bo Watson delivered his particular threats referenced above, and in apparent coordination with those threats, a newly-registered Tennessee corporation known as "Southern Momentum," represented by Chattanooga management attorney Maurice Nicely[2] and purporting to be an organization representing VWGOA workers, publicly repeated Watson's threat by stating in the press, through Nicely, that "[f]urther financial incentives – which are absolutely necessary for the expansion of the VW facility here in Chattanooga – *simply will not exist if the UAW wins this election.*" See UX6, a February 10, 2014 nationally syndicated article quoting Nicely and referring to the remarks of the State Officials that Nicely echoed as a "threat." The view that the State Officials' statements were a "threat" was echoed by Nashville management partner Zan Blue of Costangy, Brooks and Smith, who saw the statements in just that way. See February 12, 2014 9:09 a.m. audio interview at beginning at 7 minute 14 second mark at http://wutc.org/post/reality-check-uaw-ate-detroit-and-chattanooga-s-menu ("UAW Ate Detroit and Chattannoga's on the Menu?") ("They do sound like threats and threats are never useful").

3.

Also on February 10, 2014, the "Southern Momentum" No2UAW website published the State Officials' threats of loss of State financial incentives for VWGOA under the then-banner headline "VW May Lose State Help if the UAW is Voted in at the Chattanooga Plant." See archive in Exhibit UX7 (attached hereto). Other anti-UAW

[2] Southern Momentum, Inc. was incorporated on January 31, 2014. Its office address and its registered agent are Mr. Nicely's management-side law firm, Evans Harrison Hackett PLLC, in Chattanooga. See UX5 (attached hereto).

campaign websites also published these State Officials' threats, which were well known among the VWGOA worker electorate.

4.

On February 12, 2014, during the first day of the Election, United States Senator Bob Corker escalated the campaign threats made by the State Officials, stating that he had been "assured" by VWGOA that if the VWGOA workers voted against the UAW, they would be rewarded with a new product line at Chattanooga. Corker issued his dual threat and promise of benefit in the middle of the Election itself to coerce the VWGOA workforce into voting against UAW representation. Senator Corker's threat was made using United States Government resources, and was published and republished on the Senator's official Senate website, as well as very broadly disseminated in all media. Moreover, we believe that Senator Corker used government travel funds specifically to fly to Chattanooga to make his threat in the most open and notorious manner. During the press conference convened by Senator Corker to threaten VWGOA workers, he stated "I've had conversations today and based on those am ***assured*** that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga." (Emphasis supplied - of course, the only entity that can ***assure*** where a product is manufactured is Volkswagen itself.) See, e.g., http://www.corker.senate.gov/public/index.cfm/2014/2/corker-conversations-today-indicate-a-vote-against-uaw-is-a-vote-for-suv-production (see also Exhibit UX8 with multiple pages from Senator Corker's official United States Senate website). Senator

Corker's statement and his press conference were widely reported and well-known to VWGOA workers. Moreover, we submit that Senator Corker's statement appears by its timing, if nothing else, to have been part of a coordinated effort along with the above-referenced State officials and anti-union groups to coerce a no vote. It was widely published under banner headlines in the media and played repeatedly on broadcast media in Chattanooga. It promptly appeared on the No2UAW website, the Southern Momentum Facebook page, and on the Grover Norquist "Worker Freedom" campaign website. In fact, the Reuters article reporting Senator Corker's statement, entitled "Senator drops bombshell during VW plant union vote,"[3] was almost immediately linked with a "Bombshell" banner headline on the No2UAW and "Worker Freedom" Norquist websites and widely distributed as a handbill in the VWGOA plant during the Election. Moreover, when VWGOA official Frank Fischer denied a link between a vote against UAW and the placement of the new SUV in Chattanooga, Senator Corker repeated and in fact amplified his threat, saying: "Believe me, the decisions regarding the Volkswagen expansion are not being made by anyone in management at the Chattanooga plant and we are also very aware Frank Fischer is having to use old talking points when he responds to press inquiries."[4] In a widely-disseminated statement to the Associated Press, Corker also said "There is no way I'd put out a statement like I put out unless I was 1,000 percent **["1,000 percent" in original]** that it

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[3] UX9 (attached hereto): http://www.reuters.com/article/2014/02/13/us-volkswagen-corker-idUSBREA1C04H20140213 .

[4] UX10 (attached hereto: http://www.corker.senate.gov/public/index.cfm/2014/2/corker-statement-on-expansion-conversations .

was accurate in every way."[5] Senator Corker, who was the mayor of Chattanooga at the time that VWGOA decided to locate its facility there, has repeatedly and publicly emphasized his close connection to company officials. He told Nooga.com, in an article posted on February 13, that much of the negotiation that led to Volkswagen choosing Chattanooga occurred around the dining room table of Corker's Chattanooga home.[6] In yet another local newspaper article published during the Election, Senator Corker claimed that "[t]here's not a week that goes by when we don't talk to someone at VW USA or VW in Germany." See http://www.timesfreepress.com/news/2014/feb/14/for-sen-corker-the-uaw-vote-is-personal-passions . All these statements were clearly intended to convey as fact that Senator Corker knew the company's plans and that his repeated threat and promise of benefit was the truth.[7] Senator Corker's conduct was clearly timed and intended to coerce employees to vote against UAW by causing them to fear loss of new work for the Chattanooga plant, and thus a diminishment of job security, if they exercised their

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[5] UX11 (attached hereto) http://www.washingtonpost.com/business/corker-stands-by-claim-vw-will-expand-if-uaw-loses/2014/02/13/931cd628-94ff-11e3-9e13-770265cf4962_story.html .

[6] UX12 (attached hereto) http://www.chattanoogan.com/2014/2/13/269538/VW-Chattanooga-President-Disputes.aspx .

[7] Senator Corker repeatedly told the media, for public consumption, that he was the ultimate insider when it came to VWGOA's plans, including his statement during the Election that he knew more about the Company's plans than its CEO in America. Media reports concerning Senator Corker's involvement with the VWGOA facility and its leadership going back to 2008 can be found at the Volkswagen Group of America website at http://199.5.47.214/newsroom/news_2008.htm, and at related web archives on the VWGOA "Newsroom" site. Senator Corker 's point in asserting a direct link between VWGOA's assignment of the B-SUV line to Chattanooga to a vote by VWGOA workers against the UAW was that he was the most credible and reliable source of information on this issue.

federally protected right to organize. Senator Corker's conduct was shameful and undertaken with utter disregard for the rights of the citizens of Tennessee and surrounding states that work at VWGOA Chattanooga. Standing alone, it is a more than adequate basis for sustaining these Objections.

5.

The cumulative effect[8] of conduct such as that summarized above created a situation strikingly similar "to that existing when third parties conduct massive campaigns to convey the message that choosing the union would cause the employer to move or shut down and thereby deprive employees of job opportunities," *Frates, Inc.*, 230 NLRB 952 (1977). It is well-established that such campaigns, even when they are "spontaneous, motivated solely by self-interest and what it deemed best for" the community, may nonetheless destroy the possibility of a fair election. *Lake Catherine Footwear, Inc.* 133 NLRB 443, 449-450 (1961). The clear message of the campaign was that voting for the union would result in stagnation for the Chattanooga plant, with no new product, no job security, and withholding of State support for its expansion. State Senate Speaker Pro Tem Watson threatened that harm to VWGOA and its workers would come from the denial of tax and other state incentives if UAW was elected; while U.S. Senator Corker announced that he *knew from the employer* that a vote to reject the UAW would mean a vitally important new product line would be awarded to Chattanooga, and that the opposite would result if the VWGOA workers dared to

[8] See *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989) (cumulative effect of individual incidents of third-party misconduct must be considered in evaluating fairness of election).

exercise their right to vote for the UAW. Each part of this heavy-handed campaign magnified the other. *See Picoma Industries, supra,* and *Universal Mfg. Corp.*, 156 NLRB 1459 (1966). Whether spontaneous or coordinated, whether motivated by genuine concern for the community or paid from the war-chests of outside employers – the *effect* of this campaign is clear. No VWGOA employee could cast a vote without a well-founded fear that the exercise of the franchise could mean both that their job security at VWGOA and the financial health of their plant were in serious jeopardy. Such an environment, foisted on VWGOA workers by politicians who have no regard for the workers' rights under federal law, is completely contrary to the environment that the National Labor Relations Act demands for union certification elections.

CONCLUSION

The Board will set aside an election based on third-party misconduct when the misconduct created "a general atmosphere of fear or reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The five factors the Board considers in making this determination all favor setting this Election aside. The nature of the threat – the diminishment of job security if the workers vote for the union – is, like the threat of a plant closing, among the most serious that can occur. The threat was directed at the entire bargaining unit and was known to every potential voter in this extremely high visibility campaign. Moreover, the threat to eliminate state incentives was made by powerful political leaders who, in fact and in the reasonable perception of the employees, were quite capable of putting their threat into effect. Even worse, the "fist" of the State Officials' threats about tax incentives for a new product

line was in fact amplified by the "velvet glove"[9] of a United States Senator who claimed to have "***assurance***" from the Company that the new product line would be a reward for a "No" vote. In these circumstances, employees undoubtedly treated this information with utmost seriousness and accepted it as true. In fact, the "No2UAW" Facebook page, a center of debate on the campaign, placed beyond doubt how the Corker threats were to be read by the VWGOA workforce: The website's hosts linked to media reports of Corker's statements in *"The Chattanoogan"* with this host comment: "***Our choices just became clearer ... UAW or B-SUV...*** **Chattanooga Will Get New Line of SUVs if UAW Is Not Approved."** (UX13 - attached hereto, emphasis supplied). This resonates as a classic "fist inside the velvet glove" threat: if you vote against the Union, you will be rewarded, but if you go the other way you will be punished. Senator Corker knew exactly what he was doing: he was purporting to deliver from the Employer, in the midst of the Election, a promise of benefit if workers voted against the UAW, and a threat to withhold that benefit if VWGOA workers exercised their protected right to vote for the Union. Such shameful conduct, by itself, and especially when considered together with the related conduct of the State Officials, amply supports the Board granting these Objections to prevent VWGOA workers from being deprived of a free and uncoerced choice.

Because of these and other related pre-Election events, acts and conduct, the Board should set aside the Election and order that a new election be held.

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[9] *See NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

Respectfully submitted,

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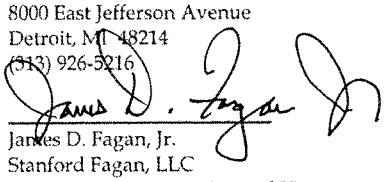
By: 

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Dated: February 21, 2014

UNION EXHIBIT:

UX 1

Automotive News

Tenn. politicians threaten to kill VW incentives if UAW wins election

Gabe Nelson
Automotive News | February 10, 2014 - 4:23 pm EST
-- UPDATED: 2/10/14 7:21 pm ET - adds new Corker-UAW dispute

WASHINGTON -- Volkswagen AG has been soliciting subsidies from Tennessee and Mexico, hoping to pick a production site this year for a mid-sized SUV due to go on sale in 2016.

And it seems that this week's UAW election at the VW assembly plant in Chattanooga could tilt the competition in Mexico's favor.

The reason? Republican lawmakers in Tennessee might no longer want to double down on the $580 million in state and local incentives that they offered VW in 2008.

If the workers opt for UAW representation, VW would have a "very tough time" securing more incentives from the state legislature, Bo Watson, a state senator from suburban Chattanooga, said during a press conference this morning. He was flanked by House Majority Leader Gerald McCormick, a powerful figure in Tennessee politics, who said the "heavy hand" of the UAW is unwelcome in the state.

"The taxpayers of Tennessee reached out to Volkswagen and welcomed them to our state and our community," McCormick, a Republican from Chattanooga, said in an e-mail to Automotive News. "We are glad they are here. But that is not a green light to help force a union into the workplace. That was not part of the deal."

A spokesman for Tennessee Gov. Bill Haslam said in an e-mail to *Automotive News* that state lawmakers would play a big role in approving incentives for the VW plant because the project would be too large to approve with existing funding for the state's "FastTrack" incentive program.

"The governor has been clear about the impact of the UAW on the state's ability to recruit other companies to Tennessee," the Haslam spokesman said. "Any discussions of incentives are part of additional and continued talks with VW, which we look forward to."

Last-minute lobbying

UAW critics jumped on the lawmakers' claim to persuade workers to vote against union representation. A group called Southern Momentum quickly put out a statement that quoted Mike Burton, a paint-shop employee who leads a coalition of workers opposed to the union.

"This confirms exactly what we have been telling people," he was quoted as saying. "A vote for the UAW is a vote against the expansion of the plant, plain and simple."

Watson and McCormick were not just critical of the UAW. They were also critical of VW, saying that the company has given union supporters an unfair advantage by allowing them to enter the plant and speak with workers.

Volkswagen denies that charge. In a statement this weekend, the company said both UAW supporters and opponents are free to hand out leaflets and speak with their fellow employees about the union drive.

The statement also said VW could have recognized the UAW with a "card check," in which signed cards of support take the place of a secret-ballot election. The company insisted on an election, said Sebastian Patta, vice president of human resources, to reflect its belief that "democracy is an American ideal."

Patta added: "Outside political groups won't divert us from the work at hand: innovating, creating jobs, growing, and producing great automobiles."

Site decision coming soon

About 1,500 workers are eligible to vote in the UAW election, which will take place Wednesday to Friday under the supervision of the National Labor Relations Board.

It is unclear whether Tennessee politicians' subsidy threat would last beyond the election or whether the promise of a plant expansion, with the thousands of jobs it would bring, would outweigh their dislike of the UAW.

Volkswagen CEO Martin Winterkorn announced last month that VW will launch a mid-sized SUV in 2016, modeled after the CrossBlue concept that was unveiled at the Detroit auto show in 2012.

Michael Macht, the board member for production at VW, told *Automotive News* at the time that a decision on a production site would follow within six months. He said VW was still asking about incentives.

Corker vs. UAW

Some top lawmakers in Tennessee have refrained from commenting ahead of the UAW election, including Republican U.S. Sen. Bob Corker, who said last year that inviting the union into its plant would make VW the "laughingstock" of the industry.

Corker has often drawn the UAW's ire for his criticism of the union, particularly during the government bailout discussions for General Motors and Chrysler in 2009.

"During the next week and a half, while the decision is in the hands of the employees, I do not think it is appropriate for me to make additional public comment," Corker told news outlets last week.

That stance drew praise from the UAW.

"Other politicians," UAW Region 8 Director Gary Casteel said, "should follow the lead of Senator Corker and respect these workers' right to make up their own minds."

But Corker, the former mayor of Chattanooga, subsequently announced later Monday that he would hold a press conference Tuesday to weigh in on the UAW election.

"I am very disappointed the UAW is misusing my comments to try to stifle others from weighing in on an issue that is so important to our community," Corker said in a statement.

"While I had not planned to make additional public remarks in advance of this week's vote, after comments the UAW made this weekend, I feel strongly that it is important to return home and ensure my position is clear."

Then, in response to Corker, Casteel issued this statement later Monday:

"It's unfortunate that Bob Corker has been swayed by special interests from outside Tennessee to flip-flop on his position on what's best for Chattanooga's working families.

"While outside interests and other politicians have been trying to impact the results of this vote, which would give Volkswagen workers a voice to make VW stronger in safety, job security and efficiency, improving the quality of life for everyone in Chattanooga. We believe Corker was right in his original statement that this vote should be left to the workers."

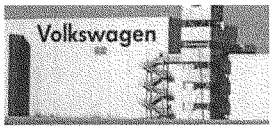


Photo credit: Reuters

UNION EXHIBIT:

UX 2

Bloomberg Businessweek

News

http://www.businessweek.com/ap/2014-02-10/tenn-dot-lawmakers-vw-incentives-threatened-by-uaw

Tenn. lawmakers: VW incentives threatened by UAW

By By Erik Schelzig February 10, 2014

NASHVILLE, Tenn. (AP) — Republican lawmakers in Tennessee on Monday threatened that the state could turn off the spigot of incentives for Volkswagen if workers at the German automaker's plant decide this week to approve union representation.

State Senate Speaker Pro Tem Bo Watson told a news conference in Chattanooga that the United Auto Workers campaign at the plant is "un-American."

"Should the workers at Volkswagen choose to be represented by the United Auto Workers, any additional incentives from the citizens of the state of Tennessee for expansion or otherwise will have a very tough time passing the Tennessee Senate," he said.

About 1,500 out of the 2,500 employees at the plant are eligible to vote in the three-day union election that begins Wednesday. Volkswagen announced earlier this year that a new SUV model will be built either in Chattanooga or in Mexico.

Republican Gov. Bill Haslam last year insisted that state incentives are not contingent on the union being rejected at the plant. Spokesman David Smith said Monday that the governor's position hasn't changed.

"Any discussions of incentives are part of additional and continued talks with VW, which we look forward to," Smith said in an email.

But state House Speaker Beth Harwell, a Nashville Republican and close Haslam ally, told The Associated Press on Monday that she shares concerns about a UAW victory at the plant.

"It would definitely put those (incentives) in jeopardy," she said. "That would jeopardize a very good arrangement for Volkswagen to locate here."

"And I hate that, because I want Volkswagen here, we're so proud and honored to have them here," she said. "But unionization is a huge setback for our state economically."

Volkswagen received a more than $500 million incentive package as part of its decision to build the plant in Chattanooga in 2008.

The UAW vote would be the first step toward creating a German-style "works council" at the plant, which would represent both blue- and white-collar employees on issues such as working conditions and plant efficiency, but not wages or benefits.

Under Tennessee law, workers would not have to join the union to be represented.

German law gives labor representatives half the seats on the Volkswagen's supervisory board, where some powerful members have raised concerns about the Chattanooga plant being alone among the company's large factories without formal labor representation.

Republican U.S. Sen. Bob Corker, who last year said Volkswagen would become a "laughingstock" for entering negotiations with the UAW, had announced last week that he would withhold public commentary on the process while the election was underway.

But in response to what he called the UAW's attempts to use his position to try to silence other critics, the former Chattanooga mayor said he will hold a news conference Tuesday to "ensure my position is clear."

UAW regional director Gary Casteel said in an email that Corker's decision to change course was driven by "special interests from outside Tennessee."

"We believe Corker was right in his original statement that this vote should be left to the workers," Casteel said.

Democratic lawmakers in the state condemned their Republican colleagues for trying to tie incentives to a rejection of the union vote at Volkswagen.

"Instead of telling them to expand, we're talking about bringing sanctions against them if they do this," said House Democratic Caucus Chairman Mike Turner of Nashville. "It's very disturbing."

Turner said that stance could have a negative impact on attracting other European businesses to Tennessee.

Labor lawyer George Barrett said the GOP move could run afoul of the national labor act, possibly giving rise to litigation.

"You're threatening to withhold a benefit you're offering to other people on the basis of membership in the unions, which is discriminatory," Barrett said.

UNION EXHIBIT:

UX 3

The New York Times http://nyti.ms/NAAsYJ

BUSINESS DAY

Union Drive Doesn't Bother Management, but G.O.P. Fumes

By STEVEN GREENHOUSE FEB. 11, 2014

As workers at the Volkswagen plant in Chattanooga, Tenn., prepare to vote this week on whether to join the United Automobile Workers, they are facing unusual pressure from the state's Republican legislators to reject the union.

State Senator Bo Watson, who represents a suburb of Chattanooga, warned on Monday that if VW's workers voted to embrace the U.A.W., the Republican-controlled Legislature might vote against approving future incentives to help the plant expand.

"The members of the Tennessee Senate will not view unionization as in the best interest of Tennessee," Mr. Watson said at a news conference. He added that a pro-U.A.W. vote would make it "exponentially more challenging" for the legislature to approve future subsidies.

A loss of such incentives, industry analysts say, could persuade Volkswagen to award production of a new S.U.V. to its plant in Mexico instead of to the Chattanooga plant, which currently assembles the Passat.

At a news conference on Tuesday, United States Senator Bob Corker, a former mayor of Chattanooga and a Republican, also called on VW employees to reject the union. He called it "a Detroit-based organization" whose key to survival was to organize plants in the South.

"We're concerned about the impact," Mr. Corker said. "Look at Detroit."

This week's vote, which will run for three days beginning on Wednesday, is being closely watched because it could make the Volkswagen factory the first foreign-owned auto assembly plant to be unionized in the traditionally anti-union South. Some industry experts say the U.A.W.'s prospects of succeeding

have been buoyed by Volkswagen's decision not to oppose the unionization drive and even to hint support for the union.

Volkswagen is eager to have a German-style works council at the Chattanooga plant. The council would bring together managers and white- and blue-collar workers to help set factory policies and foster collaboration. Many labor experts say that to have a works council, employees first need to vote for a labor union to represent them. If the Chattanooga plant establishes a works council, it would be the first factory in the United States to do so.

"Our works councils are key to our success and productivity," said Frank Fischer, Volkswagen Chattanooga's chief executive and chairman. "It is a business model that helped to make Volkswagen the second-largest car company in the world. Our plant in Chattanooga has the opportunity to create a uniquely American works council, in which the company would be able to work cooperatively with our employees and ultimately their union representatives, if the employees decide they wish to be represented by a union."

Labor experts say a U.A.W. victory could create momentum to unionize the Mercedes-Benz plant in Vance, Ala., and the BMW plant in Spartanburg, S.C.

Concerned that a U.A.W. victory would hurt Tennessee's business climate, Gov. Bill Haslam has warned that auto parts suppliers might decide against locating in Chattanooga because they might not want to set up near a unionized VW plant.

"I think that there are some ramifications to the vote in terms of our ability to attract other suppliers," the Republican governor told the editorial board of The Tennessean last week. "When we recruit other companies, that comes up every time."

The Republican pressure has had the U.A.W. and Democratic lawmakers crying foul.

"This is an outrageous and unprecedented effort by state officials to violate the rights of employers and workers," said Mike Turner, chairman of Tennessee's House Democratic Caucus. "Republicans are basically threatening to kill jobs if workers exercise their federally protected rights to organize. When the company says they don't have a problem with it, what right does the state have to come in and say they can't do it?"

Gary Casteel, the U.A.W.'s director for the South, voiced dismay with lawmakers' threats to end future subsidies to VW.

"It's sad that when workers exercise their legal right to form a union, some Tennessee politicians are threatening the economic well-being of communities and businesses just because workers want to have a voice in the future of Volkswagen in Chattanooga," Mr. Casteel said.

U.A.W. officials say that numerous auto parts suppliers have set up shop near G.M.'s unionized auto plant in Spring Hill, Tenn.

The nation's leading anti-tax activist, Grover Norquist, and his group, Americans for Tax Reform, have joined the anti-union campaign, warning that a U.A.W. victory would help bring big government to Tennessee. The group's new affiliate, the Center for Worker Freedom, has put up 13 billboards in Chattanooga, with some calling the U.A.W. "United Obama Workers" and saying, "The UAW spends millions to elect liberal politicans" — misspelling "politicians." Another billboard says, "Detroit: Brought to you by the U.A.W.," and shows a photo of a Packard plant that was shuttered 55 years ago.

Chris Brown, a pro-union Volkswagen worker, objects to the Republicans' pressure. "This decision should be between the workers, VW and the U.A.W.," he said. "We're the parties involved. Governor Haslam is elected to run the state. This is our workplace and our decision."

While Republicans argue that having a union would make the plant less competitive, Mr. Brown said that having a union and works council would make it more competitive by increasing employee-management cooperation.

Volkswagen, saying it was concerned about employees' privacy, persuaded the U.A.W. not to have organizers visit workers at home to urge them to vote for the union. In return, VW has let organizers into break rooms to answer questions about unionizing.

Mike Burton, a VW worker who is opposed to the U.A.W., says that has given the union an unfair advantage, although VW officials say anti-union and pro-union workers are free to campaign and talk to one another during breaks.

Though hit hard by the Republicans' attacks, U.A.W. officials are predicting victory, noting that most of the plant's workers signed cards favoring a union.

But Matt Patterson, executive director of Mr. Norquist's Center for Worker Freedom, said: "I'm not predicting victory at all. As long as people are informed and know the facts, then I consider our job done. If workers learn all the facts and want a union, that's their right."

A version of this article appears in print on February 12, 2014, on page B3 of the New York edition with the

headline: Automaker Gives Its Blessings, and G.O.P. Its Warnings.

UNION EXHIBIT:

UX 4

Breaking News

Bo Watson Says VW May Lose State Help If The UAW Is Voted In At Chattanooga Plant; McCormick Urges Workers To Reject Union; Corker To Hold Press Conference; Democrats Respond

Monday, February 10, 2014 - by Hollie Webb

State Senator Bo Watson speaks at press conference
- photo by Hollie Webb

In a press conference to address the potential unionization of the Volkswagen plant, State Senator Bo Watson said, "Should the workers at Volkswagen choose to be represented by the United Auto Workers, then I believe any additional incentives from the citizens of the state of Tennessee for expansion or otherwise will have a very tough time passing the Tennessee Senate."

He said, "I do not see the members of the Senate having a positive view of Volkswagen because of the manner in which this campaign has been conducted."

He stated, "The workers that will be voting, need to know all of the potential consequences, intended and unintended, should they choose to be represented by the United Auto

Workers."

He said, "Einstein said doing the same thing over and over again and expecting a different result is truly the definition of insanity." He told the audience that the union might start out well, but said history showed it would not end that way.

He reiterated that Tennessee was a "Right to Work" state and "pro-business."

Senator Watson said, "I believe the members of the Tennessee Senate will not view unionization as in the best interest of Tennessee. The Governor, the Department of Economic and Community Development, as well as, the members of this delegation, will have a difficult time convincing our colleagues to support any Volkswagen incentive package."

He also said the unionization would make their job "exponentially more challenging."

He continued, saying, "I encourage the workers at Volkswagen to carefully consider the decision they will make this Wednesday, Thursday, and Friday. I ask that they consider the effects, not just within Volkswagen, but within our community, our state, and our region."

House Majority Leader Gerald McCormick said, "I encourage the employees of Volkswagen to reject bringing the United Auto Workers Union into the Plant and into our community. As you consider your vote, ask yourself this question - Will I be better off with the UAW? When you consider that question, I believe the answer will be NO! I wish the UAW had been willing to have an open and fair debate within the workplace. The fact that the UAW refused to allow all points of view to be heard and discussed demonstrates how they are unwilling to have an open, honest representation to ALL employees.

"The taxpayers of Tennessee reached out to Volkswagen and welcomed them to our state and our community. We are glad they are here. But that is not a green light to help force a union into the workplace. That was not part of the deal.

"To the employees of Volkswagen: You are leaders, and you are setting the course for the future of our community and our region. You have performed well. You have built the Car-of-the-Year. You have good wages and benefits. All of this happened without the heavy hand of the United Auto Workers. I urge you to keep your voice and vote NO."

A protest group in support of the union, calling themselves "Millionaires for Wealthcare," also showed up for the press conference. After Senator Watson finished, their members applauded and said, "Thank you for being champions of the 1 percent."

They held signs that read, "Bonuses for CEOS, not workers!"

The group also handed out a satirical press release. They said, "Millionaires for Wealthcare supports cheap labor, taxes on labor to support subsidies for our big corporations, no democracy in the work place, high CEO bonuses, and unlimited campaign contributions and the politicians that support those policies."

Senator Bob Corker set a press conference on the VW vote on Tuesday at 12:30 p.m. at the EPB Building.

He said Monday, "I am very disappointed the UAW is misusing my comments to try to stifle others from weighing in on an issue that is so important to our community. While I had not planned to make additional public remarks in advance of this week's vote, after comments the UAW made this weekend, I feel strongly that it is important to return home and ensure my position is clear."

The Chairman and Vice-Chairman of Tennessee's Senate Commerce and Labor Committee "expressed concern regarding the United Auto Workers (UAW) upcoming vote in Chattanooga, saying a vote for organized labor would harm Tennessee's reputation as a business-friendly state and reverse the state's recent progress in automobile-related job growth. Chairman Jack Johnson (R-Franklin) and Vice-Chairman Mark Green (R-Clarksville) said the General Assembly has worked in concert with Governors Phil Bredesen and Bill Haslam for the past several years to move forward policies to support Tennessee's competitive standing in growing and expanding new and better paying jobs in the state. The lawmakers said that pending decisions of VW employees are of statewide interest at a pivotal time when Tennessee stands currently as a national leader in job creation.

"We greatly value our auto workers, both in Middle Tennessee and in Southeast Tennessee," said Senator Johnson, a businessman whose legislative district is home to the General Motors Spring Hill plant and Nissan's North America headquarters. "Our communities are very similar with great neighborhoods, schools that focus on achievement and a local

economy that is envied by many. The automotive industry is a very important part of the quality of life we enjoy."

"As Chattanooga workers vote on the United Auto Workers presence, it is a decision that transcends just one community," he added. "There is tremendous competition for job growth among states. A vote for organized labor would impede our daily efforts to benefit Tennessee families as we compete nationally in job growth. I ask that Chattanooga lead to honor Tennessee's competitive spirit so we can continue moving our state's job growth forward. Chattanooga workers, we don't need the UAW in our state."

"In business, reputation means a lot," added Senator Green, who is a practicing physician and businessman who represents the more rural Clarksville region that competes with industry across the state-line of Kentucky. "Tennessee has developed a reputation of a top location for families and businesses because of the lower cost of living, commitment to an educated workforce and folks keeping more of our wages by holding taxes low."

"Volkswagen chose our state and your community for important reasons: Chattanooga workers have a great reputation of a great work ethic and make an excellent product. That reputation has been yours without the United Auto Workers," he continued. "The free market that VW chose in our state produces competition, empowers employees far more than a labor union, and keeps bringing jobs to Tennessee."

"In my 20 years on the hill, I've never seen such a massive intrusion into the affairs of a private company," said House Democratic Leader Craig Fitzhugh. "When management and workers agree—as they do at Volkswagen—the state has no business interfering. Words have consequences and these type of threats could have a ruinous effect on our state's relationships with not just Volkswagen, but all employers."

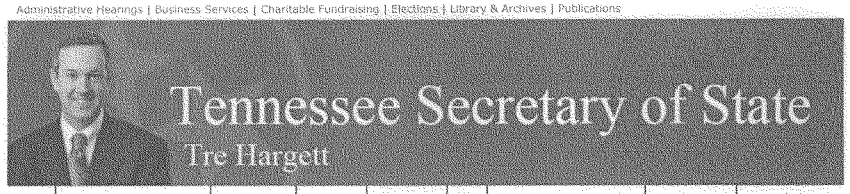
"This is an outrageous and unprecedented effort by state officials to violate the rights of employers and workers," said House Democratic Caucus Chairman Mike Turner. "Republicans are basically threatening to kill jobs if workers exercise their federally protected rights to organize. When the company says they don't have a problem with it, what right does the state have to come in and say they can't do it?"

Voting will take place at Volkswagen starting on Wednesday and ending on Friday on whether to allow the United Auto Workers to represent workers at the plan.

Protestors
- Photo2 by Hollie Webb

UNION EXHIBIT:

UX 5



Business Entity Detail

Available Entity Actions

File Annual Report (due 3/31/2014)

Certificate of Existence

More

Entity details cannot be edited. This detail reflects the current state of the filing in the system.

Return to the Business Information Search.

000745893: Corporation Non-Profit - Domestic

Printer Friendly Version

Name: Southern Momentum, Inc.

Status: Active
Initial Filing Date: 01/31/2014
Formed in: TENNESSEE
Delayed Effective Date:
Fiscal Year Close: December
AR Due Date: 04/01/2015
Term of Duration: Perpetual
Inactive Date:
Principal Office: ONE CENTRAL PLAZA
835 GEORGIA AVE STE 800
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Phone: (423) 648-7894
Mailing Address: ONE CENTRAL PLAZA
835 GEORGIA AVE STE 800
CHATTANOOGA, TN 37402-2225 USA
AR Exempt: No
Obligated Member Entity: No
Public Benefit Corporation: Yes

Assumed Names | History | **Registered Agent**

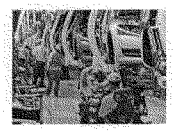
Agent Name: EVANS HARRISON HACKETT PLLC
Agent Address: 835 GEORGIA AVE
STE 800
ONE CENTRAL PLAZA
CHATTANOOGA, TN 37402-2225 USA

UNION EXHIBIT:

UX 6

VW union vote could halt state incentives

Brent Snavely, Detroit Free Press 2:52 p.m. EST February 10, 2014



(Photo: Erik Schelzig AP)

A crusade by anti-union forces in Tennessee, including the state's governor and a senior senator, now is as much a fight with Volkswagen management as with the United Auto Workers union.

Volkswagen's neutrality has been challenged by opposition groups. They charge that the German automaker is, in fact, carefully orchestrating a plan to help the UAW win the election.

Some 1,500 VW workers at the plant vote Wednesday through Friday on UAW representation. The secret balloting will be overseen by the National Labor Relations Board.

On Monday, state Republican leaders accused Volkswagen of supporting the UAW and they threatened to withhold any tax incentives for future expansion of the three-year-old assembly plant in Chattanooga if workers vote to join the UAW.

"Should the workers at Volkswagen choose to be represented by the United Auto Workers, then I believe any additional incentives from the citizens of the State of Tennessee for expansion or otherwise will have a very tough time passing the Tennessee Senate," State Sen. Bo Watson, R-Chattanooga, said in a statement sent to the *Free Press*.

A worker opposition group called Southern Momentum echoed that position in a statement.

"Further financial incentives — which are absolutely necessary for the expansion of the VW facility here in Chattanooga — simply will not exist if the UAW wins this election," Maury Nicely, a Chattanooga labor lawyer representing Southern Momentum said.

Today's threat comes less than 48 hours after Volkswagen said it favors a German-style works council with union representation.

"Outside political groups won't divert us from the work at hand: innovating, creating jobs, growing, and producing great automobiles," said Sebastian Patta, Volkswagen Chattanooga vice president of human resources.

The anti-union forces now are countering that VW isn't neutral, it is pro-union.

Volkswagen said workers in favor of and opposed to UAW representation have had opportunities to distribute information and talk to other workers.

"U.S. labor law requires VW to have a union in order for the works councils to be legal. If Volkswagen workers vote for the union it is expected to have a ripple effect on other auto manufacturers in the southern United States and their suppliers," according to Art Wheaton, automotive industry expert and senior extension associate at Cornell University.

"UAW International President Bob King has staked his legacy and reputation on the ability to organize a foreign automaker in the South. Volkswagen's global corporate philosophy and strategic advantage is having 'works councils' represent the plant workers and management in major decisions including locating new vehicle production," Wheaton noted.

In January, Volkswagen said it will invest $7 billion in North America over the next five years in its quest to sell more than 1 million Volkswagen and Audi vehicles in the U.S. by 2018.

A new SUV is seen as key to reaching that goal.

Martin Winterkorn, Volkswagen's global CEO, would not say where the SUV would be built, but Chattanooga is a likely site. Winterkorn said the decision would not be influenced by whether workers vote to join the UAW.

Volkswagen also has a plant in Puebla, Mex.

If workers at the Volkswagen plant in Tennessee vote for UAW representation the union and company will form a German-style works council at the plant.

A 20-page legal agreement for a union election between the UAW and Volkswagen says that the UAW has agreed to delegate to the works council many of the functions and responsibilities ordinarily performed by unions.

"Our works councils are key to our success and productivity. It is a business model that helped to make Volkswagen the second largest car company in the world," Frank Fischer, chairman and CEO of Volkswagen Chattanooga said in a statement.

UNION EXHIBIT:

UX 7

NO TO
UNINFORMED
AUTO WORKERS

Chattanooga, Tennessee

UAW'S Secret Sellout at VW
Top 10 Reasons To Vote No
** HANDOUTS **
PRESS RELEASES
Documents
Videos
VW / UAW In the News
Community
Videos
** MORE **

Election results are in.
Thank you to everyone for your hard work and realization
that we don't need the UAW to have a voice.
712 - 626 against the UAW.

Losing Volkswagen Was Nothing Compared With Next UAW Fear

Analysis: How UAW Bosses Rode Into Chattanooga
And Promptly Fell Off Their Trojan Horse
"What few, including the UAW, realize is that the union's defeat in Chattanooga is more of a David vs. Goliath story and how Goliath (the UAW) handed David (the employees) the stones."

Wall Street Journal by Neal Boudette
VW Workers in Chattanooga Reject Auto Workers Union

Wall Street Journal - Market Watch
Union Suffers Big Loss at Tennessee VW Plant

Nooga.com By Chloé Morrison
UAW loses representation vote at Volkswagen Chattanooga

Wall Street Journal: Volkswagen's Union Gamble

An interesting quote from the Wall Street Journal:

"Volkswagen's un-neutral ***"neutrality agreement" with the UAW is arguably a violation of Taft-Hartley's prohibition on employers giving a "thing of value" to a union seeking to organize its employees****. The Supreme Court last year dismissed as improvidently grantedMulhall v. Unite Here Local 355, which challenged the legality of such business-labor collusion.* ***The Chattanooga campaign could provide the judiciary an opportunity to revisit the issue."***

UAW President Bob King:
"We're not really giving up control [at VW]."

VW NEUTRALITY AGREEMENT EXPOSES UAW'S SECRET SELLOUT OF VOLKSWAGEN TEAM MEMBERS

TOP 10 REASONS WHY VW TEAM MEMBERS SHOULD VOTE NO TO THE UAW

RIGHT-TO-WORK? UNION PUBLISHES NAMES OF MEMBERS WHO OPTED-OUT IN 'FREELOADERS LIST'

Three videos the UAW does not want you to see.

Click on each video to discover WHY.

Why VW Team Members are Opposed to the UAW from Otto Worker on Vimeo.

Volkswagen Team Member Testimonials from Otto Worker on Vimeo.

Victim of UAW's Influence at Westmoreland from Otto Worker on Vimeo.

VW TEAM MEMBERS SPEAK OUT ON WHY THE UAW IS WRONG FOR CHATTANOOGA

[Video] The UAW Is 'Mortally Wounded' And 'Desperate'

VW May Lose State Help If The UAW Is Voted In At Chattanooga Plant

The UAW Was Opposed To VW Jobs In Chattanooga Before It Was For Them

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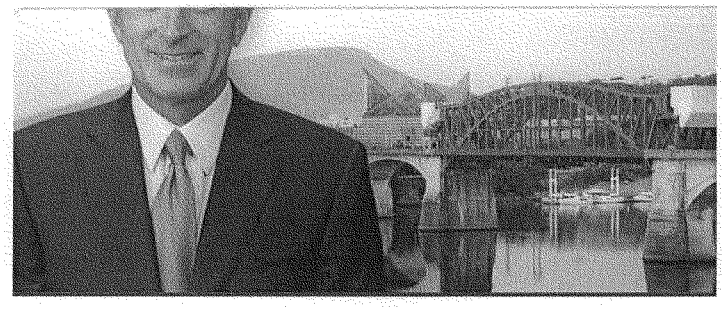
UNION EXHIBIT:

UX 8

Bob Corker

U.S. Senator for TENNESSEE



CORKER IN THE NEWS

CORKER STATEMENT ON VOLKSWAGEN ELECTION RESULTS

February 14, 2014

CHATTANOOGA, Tenn. – U.S. Senator Bob Corker, R-Tenn., today released the following statement. "Needless to say, I am thrilled for the employees at Volkswagen and for our community and its future," said Corker. As mayor of Chattanooga from 2001-2005, Corker worked with officials and community leaders to develop the 1,200 acre Enterprise South Industrial Park, which is now home to Volkswagen's North American manufacturing headquarters. Much of the negotiation that led to Volkswagen choosing Chattanooga occurred around the dining room table of Corker's Chattanooga hom... [continue]

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Feb 12 2014

CORKER: CONVERSATIONS TODAY INDICATE A VOTE AGAINST UAW IS A VOTE FOR SUV PRODUCTION

CHATTANOOGA, Tenn. – U.S. Senator Bob Corker, R-Tenn., today released the following statement regarding the ongoing vote at the Volkswagen plant.

"I've had conversations today and based on those am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga," said Corker.

As mayor of Chattanooga from 2001-2005, Corker worked with officials and community leaders to develop the 1,200 acre Enterprise South Industrial Park, which is now home to Volkswagen's North American manufacturing headquarters. Much of the negotiation that led to Volkswagen choosing Chattanooga occurred around the dining room table of Corker's Chattanooga home.

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Permalink: http://www.corker.senate.gov/public/index.cfm/2014/2/corker-conversations-today-indicate-a-vote-against-uaw-is-a-vote-for-suv-production

Feb 14 2014

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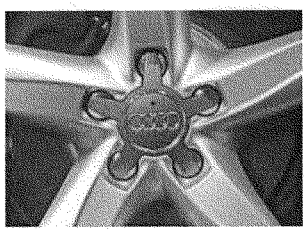
UNION EXHIBIT:

UX 9

U.S. senator drops bombshell during VW plant union vote

Thu, Feb 13 2014

By Bernie Woodall



CHATTANOOGA, Tennessee (Reuters) - U.S. Senator Bob Corker of Tennessee said on Wednesday he has been "assured" that if workers at the Volkswagen AG plant in his hometown of Chattanooga reject United Auto Worker representation, the company will reward the plant with a new product to build.

Corker's bombshell, which runs counter to public statements by Volkswagen, was dropped on the first of a three-day secret ballot election of blue-collar workers at the Chattanooga plant whether to allow the UAW to represent them.

Corker has long been an opponent of the union which he says hurts economic and job growth in Tennessee, a charge that UAW officials say is untrue.

"I've had conversations today and based on those am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga," said Corker, without saying with whom he had the conversations.

In the past few weeks, Volkswagen officials have made several statements that the vote will have no bearing on whether the SUV will be made at the Chattanooga plant or at a plant in Puebla, Mexico.

National Labor Relations Board expert Kenneth G. Dau-Schmidt, who is professor of labor at the University of Indiana-Bloomington, said Corker was trying to intimidate workers into voting against the union.

"I'm really kind of shocked at Corker's statement," said Dau-Schmidt. "It's so inconsistent with what VW has been saying and VW's labor relations policy in general."

The Indiana professor also said Corker's comments "would be grounds to set the election aside and have to run it all over again at a later date" because it could be ruled to be interfering to the point that it is against federal labor law.

A spokeswoman for Corker did not respond when asked whether the senator also meant that a vote for the UAW would mean that the plant would not get the new product, which could create an estimated 1,500 new jobs.

Volkswagen officials did not return calls and emails for comment on Corker's statement.

Mike Burton of Southern Momentum, an anti-UAW group of plant workers, said Corker's statement makes sense.

"We are in a battle with Mexico on where this new product goes," said Burton, "and it stands to reason that the union will add costs. We need to keep costs down to fight for that new product."

Another labor expert, Harley Shaiken of the University of California-Berkeley, said, "The senator's comments amount to economic intimidation that undermines the whole nature of union representation elections."

Shaiken often advises UAW officials.

"If the senator's statement doesn't violate the letter of the law, it certainly violates the spirit of the law," Shaiken said.

UAW REACTION

Gary Casteel, UAW regional director for a 12-state area that includes Tennessee, said on Wednesday night, "Corker's statement is in direct contradiction to Volkswagen's statements.

"They have specifically said that this vote will have no bearing on the decision of where to place the new product."

In the past, Casteel has said that Volkswagen's Chattanooga plant, opened in 2011, needs a second product to survive. It has built the compact Passat sedan since it opened.

The plant has about 1,550 Volkswagen workers eligible to vote in the election, which is supervised by the National Labor Relations Board.

Pro- and anti-UAW workers said they were not sure if snowy weather will affect turnout for the vote, which ends on Friday when the plant does not produce cars.

On Wednesday - day one of the vote - the night shift was canceled after only one car was produced because snow prevented

workers reaching the plant, said two VW employees who wished to remain anonymous.

A source familiar with the plans of the Volkswagen supervisory board which makes decisions on product placement said that the board has not yet made a decision on the issue, and that it will take it up in a meeting on February 22.

Corker on Tuesday returned from Washington to hold a Tuesday press conference at his downtown Chattanooga senate office in order to speak against the UAW in time for the worker vote at the plant.

(Reporting by Bernie Woodall; Editing by Christopher Cushing)

UNION EXHIBIT:

UX 10

Feb 13 2014

CORKER STATEMENT ON EXPANSION CONVERSATIONS

CHATTANOOGA, Tenn. – U.S. Senator Bob Corker, R-Tenn., today released the following statement.

"Believe me, the decisions regarding the Volkswagen expansion are not being made by anyone in management at the Chattanooga plant and we are also very aware Frank Fischer is having to use old talking points when he responds to press inquiries," said Corker. "After all these years and my involvement with Volkswagen, I would not have made the statement I made yesterday without being confident it was true and factual."

As mayor of Chattanooga from 2001-2005, Corker worked with officials and community leaders to develop the 1,200 acre Enterprise South Industrial Park, which is now home to Volkswagen's North American manufacturing headquarters. Much of the negotiation that led to Volkswagen choosing Chattanooga occurred around the dining room table of Corker's Chattanooga home.

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Permalink: http://www.corker.senate.gov/public/index.cfm/2014/2/corker-statement-on-expansion-conversations

UNION EXHIBIT:

UX 11

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Corker stands by claim VW will expand if UAW loses

By Associated Press, Published: February 13

NASHVILLE, Tenn. — U.S. Sen. Bob Corker on Thursday stood by his statements that Volkswagen is ready to announce it will expand its lone U.S. plant in Chattanooga if workers there reject the United Auto Workers.

But the Tennessee Republican said in a phone interview with The Associated Press that he didn't inquire whether the German automaker would scrap plans to build a new midsized SUV at the plant if the UAW wins.

About 1,500 workers at the plant are eligible to cast votes in the three-day union election that ends Friday.

Corker declined to say whom at Volkswagen he had spoken to and how they were in a position to know what the German automaker's decision would be.

While the claimed link between the union vote and the expansion decision has long been denied by company officials, Corker said his sources weren't concerned about the release of a potentially conflicting information.

"I don't think there's any question that a public statement was expected to made," he said. "What I did was very, very appropriate."

Corker's comments could raise questions about interference in a union vote.

John Logan, a labor and employment studies professor at San Francisco State University, said politicians are usually not included in rules governing the behavior of the company, unions and workers during an election.

"But here it could make a difference that he is attributing these comments to VW, even though they appear to be untrue," Logan said in an email.

Corker first made his unattributed claim in a news release on Wednesday night, which promoted Frank Fischer, the CEO of the Volkswagen plant in Chattanooga, to issue a statement that the company's position remains unchanged.

"There is no connection between our Chattanooga employees' decision about whether to be represented by a union and the decision about where to build a new product for the U.S. market," he said.

That didn't dissuade Corker, who issued another statement reiterating his original claim Thursday morning. He defended the move in the phone interview.

"There is no way I'd put out statement like I put out unless I was 1,000 percent that it was accurate in every way," Corker said. "Not only from the standpoint of my own credibility, but also knowing the stakes that are

here, and not wanting to say something that in any way would be off the point."

UAW supporters at the plant said Corker's comments would not turn the vote against the union.

"It's more of an insult than anything," David Gleeson, a team leader on the plant's door line, said in a phone interview.

"He's trying to threaten us with future expansion, and he's actually making workers angry at the plant," he said.

Volkswagen has said a new SUV for the U.S. market will be built either in Chattanooga or in Mexico. The Chattanooga plant makes the midsized Passat sedan, and increased production is seen as crucial to improving efficiency at the facility.

Republican politicians have argued that the introduction of the UAW at the plant would hurt the region's ability to attract manufacturing jobs to the state and region.

UNION EXHIBIT:

UX 12

VW Chattanooga President Disputes Corker Statement On New Line Of SUVs And Union Vote; Corker Retorts

Thursday, February 13, 2014

Frank Fischer, CEO and chairman of Volkswagen Chattanooga, on Thursday disputed a statement made by Senator Bob Corker at a press conference on Wednesday.

Mr. Fischer said, "There is no connection between our Chattanooga employees' decision about whether to be represented by a union and the decision about where to build a new product for the U.S. market."

Later in the morning, Senator Corker replied, "Believe me, the decisions regarding the Volkswagen expansion are not being made by anyone in management at the Chattanooga plant and we are also very aware Frank Fischer is having to use old talking points when he responds to press inquiries.

"After all these years and my involvement with Volkswagen, I would not have made the statement I made yesterday without being confident it was true and factual."

Senator Corker said Wednesday that Chattanooga will be getting the production of a second line of vehicles as long as the UAW is not voted in by employees.

He said, "I've had conversations today and based on those am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga."

His staff said, "As mayor of Chattanooga from 2001-2005, worked with officials and community leaders to develop the 1,200 acre Enterprise South Industrial Park, which is now home to Volkswagen's North American manufacturing headquarters.

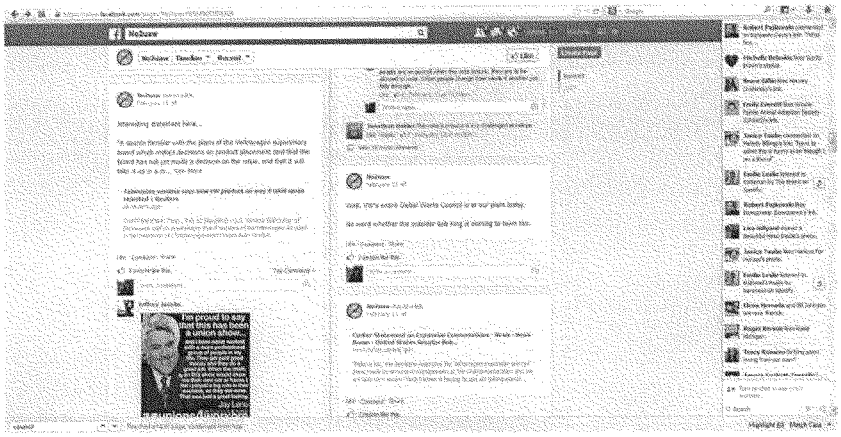
"Much of the negotiation that led to Volkswagen choosing Chattanooga occurred around the dining room table of Corker's Chattanooga home."

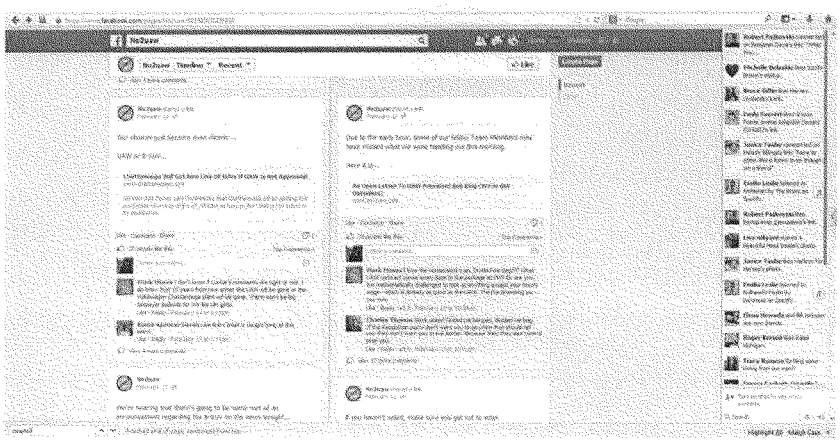
The voting began Wednesday and continues through Friday.

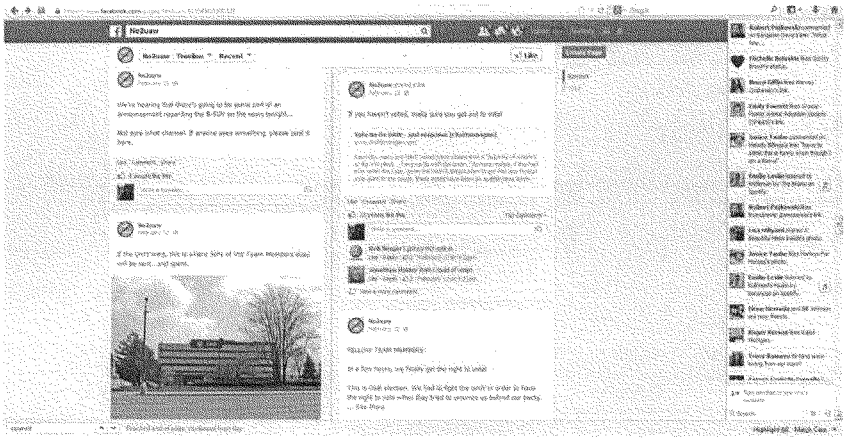
VW officials said, "Volkswagen has invested $1 billion in the local economy for the Chattanooga plant and has created more than 5,000 jobs in the region. According to independent studies, the Volkswagen plant is expected to generate $12 billion in income growth and an additional 9,500 jobs related to its investment."

UNION EXHIBIT:

UX 13







Mr. MILLER. Thank you. Ms. Sencer, in my opening remarks, I referred to statements made by prominent politicians, including United States Senator Bob Corker, prior to the recent UAW election at the Volkswagen plant in Chattanooga, Tennessee. Following the election, UAW filed a complaint with the NLRB alleging interference by politicians, like Senator Corker, interfered with the representation election in Tennessee.

Can you speak about the goals of representation elections to provide employees with a free choice whether to join a union, and how could comments from politicians from Tennessee have tainted that election process? Are there cases where the Board has considered the statements by third parties in considering whether or not to order new elections?

Ms. SENCER. There is a whole line of cases about interferences before an election.

Chairman KLINE. Microphone, please.

Ms. SENCER. Sorry. There is a whole line of cases regarding interference by third parties inside elections, and the goal of the National Labor Relations Board is to have an election, which has laboratory conditions that creates this kind of falsehood that employees are in a bubble and nothing should disturb that bubble.

Whether or not statements of third parties interfere with that bubble is to some degree based on the dissemination, how many people hear these statements, and then the nature of the statements themselves.

General statements of support or nonsupport for unionization are generally not seen as to interfere with the right to vote, but threats or benefits that can be carried out by the party speaking generally are seen to be interference with an election. And when an election is interfered with, when the laboratory conditions are disturbed, there is a sense that there is fear and coercion when the vote is taking place and this results generally in a re-run election.

Mr. MILLER. Thank you. You mentioned in your statement, I believe, about the length of time, what lengthening that time means and what happens in that election process with that lengthening of time.

Ms. SENCER. Sure. The election process under even the proposed rule does not have a set period of time in which it is going to happen. There would still in fact be pre-election hearings if necessary when the number of people or the amount of classifications in dispute is more than 20 percent of the unit that is being proposed by the union. So the idea that we are not going to have any pre-election hearings and we are not going to know the scope of the bargaining unit before the election, I don't think is accurate under the terms of the proposed rule.

But the statistics show and the studies show that in fact most of the most egregious unfair labor practices, which are even a higher standard than objectionable conduct that interferes with the election, happens in the days right before the filing of the petition, giving rise to the belief that employers know about the petition prior to the petition being filed. And there is research that also shows and my experience also shows that the longer the time between the petition being filed and the election being held, the more likely there will be behavior by the employer that results, not just

in objectionable behaviors that could interfere with an election, but actually unfair labor practice, not just charges filed by the union, but complaints issued by the region, which means that it is not that I am saying it or the union is saying it, but the independent investigation of the Board agents and field attorneys has shown that there is something worth going to trial on because it seems that the acts of the employer have interfered with the ability of the employees to have a free choice and open vote.

Mr. MILLER. As I understand it, under the current process, employers can campaign 24 hours a day with their employees. They can employ this all throughout the workweek, all throughout the time the employee is at the plant. And they have, obviously, access to information. They can call them at home. They can ask them to come to meetings; even before the petition, they can hold meetings about unionization about the workplace, and they have all of that access. The suggestion is that somehow now to give expanded information about the employees to the union, that somehow that is an absolute abuse of the process.

Can you comment on that and what your experience has been?

Ms. SENCER. Sure. Well, since 1966 the Board has required an employer provide the union with the home addresses of the employees in the bargaining unit, so the idea that this is some kind of new invasion on privacy doesn't really hold much water. Since 1966, the rule has been in place that the home addresses have to provided.

Mr. MILLER. Do you know of any improper disclosing of that information?

Ms. SENCER. I don't know of any improper disclosing of that information, and it seems to me that a union would have lots of incentives not to disclose that information improperly. This is a group of people that they are trying to explain unions to that they hope to have as members. It wouldn't serve any purpose for them to disclose that information, just like employers already have that information, and we don't see employers wrongly using that information either.

Mr. MILLER. Thank you very much.

I yield back.

Chairman KLINE. I thank the gentleman.

Mr. Walberg, you are recognized.

Mr. WALBERG. Thank you, Mr. Chairman.

You have given me voice here. I appreciate the panel being here.

Mr. Messenger, just to make sure I understand it correctly, the new proposed rules require employers to turn over to a petitioning union an electronic list of all their employees' telephone numbers, email addresses, and a number of other personal pieces of information. Am I correct in understanding that?

Mr. MESSENGER. Yes.

Mr. WALBERG. And, Mr. Browne, as I understood from your testimony, you don't keep most of that list.

Mr. BROWNE. We don't keep the electronic side of things and unlisted phone numbers.

Mr. WALBERG. Unlisted phone—what about email addresses?

Mr. BROWNE. No, sir, we do not.

Mr. WALBERG. So those are not there.

Mr. BROWNE. No.

Mr. WALBERG. Ms. Davis, what problems would develop for Mr. Browne's company if they could not hand over an electronic list of all of this information to a union requesting it?

Ms. DAVIS. Elections are automatically overturned if the current Excelsior list is not presented in its correct form and at the correct time, and the rule would be the same under the proposed rules for the new additional information that is required.

Mr. WALBERG. What if the information isn't fully accurate, such as an email address that was changed recently and never reported to the employer?

Ms. DAVIS. Elections can be overturned on that basis.

Mr. WALBERG. On that simple basis.

Ms. DAVIS. Yes.

Mr. WALBERG. Mr. Messenger, do employees gain any right to privacy under these new rules? Any right?

Mr. MESSENGER. No, they do not. There is nothing in these rules that guarantee employees' personal privacy. There is no option for them to opt out the disclosures, not that such an option would even be effective given the short time frames. But there are no protections for employee privacy. The union is given the information to effectively use as it will in the organizing campaign.

Mr. WALBERG. No right to privacy.

Mr. MESSENGER. Yes.

Mr. WALBERG. Mr. Browne, in your testimony, you say that LaRosa has 1,200 employees, most of which work part time.

Mr. BROWNE. Yes, sir.

Mr. WALBERG. If election times were significantly shortened, how would this impact your ability to communicate with your employees?

Mr. BROWNE. I think it would be very difficult, Mr. Representative, because we have people who work as short as two hours on a Saturday night, and if something was filed in the first part of the week, by the time I would get to them, we would be six days into the notification. So since our employees work variable work schedules at variable times, it would be hard to get everybody at one time.

Mr. WALBERG. Ms. Davis, what kind of costs are we talking about to a small business to incur during this time to deal with the proposed rules?

Ms. DAVIS. Yes, Mr. Representative. Most small businesses do not have a labor lawyer at the ready. They may not have ever had an occasion to hire a labor lawyer in the past. So, in a short period of time here, no more than seven days, they will be required to seek and try to obtain counsel, to educate that counsel about their business, because don't forget, under the proposed rules now, the statement of position has to be filed no later than seven days, raising every possible issue, or it can be waived. I can tell you, under my 35 years, it is challenging under current rules to get up to speed—

Mr. WALBERG. I guess, going with that train, how long does it typically take you to develop the information first and ultimately then to develop the defense, the case that goes with it?

Ms. DAVIS. Well, under the current rules, sometimes we are required to do it as soon as 10 days, but not seven days, and under the current rules, we can litigate at the pre-election conference, but we still have an opportunity. We haven't waived necessarily issues that weren't raised in the pre-election conference. Issues can still be raised by means of challenging ballots of voters at the election. You can still raise an issue about their eligibility to vote.

Under the new rules, there would be no opportunity to do that, unless you had stated it in your statement of position, which is due no sooner than—no later than, I am sorry, seven days after the petition is filed. So it is very challenging for small employers. It is equally challenging for large employers, because as an outside counsel, I have to learn their business, how it operates, which group of employees interact with whom, which employees have a community of interest with others. Do they have similar wages, hours, working conditions, supervision? Is what they do at that company related to what another employee does and how? There are many things that have to be learned in order to effectively represent an employer in these kinds of proceedings, and that is all being very much short-circuited under these proposed rules.

Mr. WALBERG. Thank you.

I yield back.

Chairman KLINE. I thank the gentleman.

Mr. Scott, you are recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Sencer, on the law on threatening to move jobs in retaliation for legal labor organizing, are there examples where elections have been overturned?

Ms. SENCER. Yes. If an employer were to make the kind of statements that we heard in, for example, in the UAW case here that were coming from the politicians, it is quite likely, I don't want to—obviously, you can never 100 percent predict, but quite likely the election would be overturned. It is this concept that they call the fist inside the velvet glove, where the person who has the control and the ability to make decisions that affect your job, when they say something that is either a threat or a benefit, it is taken very seriously in interfering with laboratory conditions.

Mr. SCOTT. And elections have been overturned when that happened?

Ms. SENCER. Yes.

Mr. SCOTT. Have elections not been overturned when that happens?

Ms. SENCER. It depends upon the nature of the statement made, the person who is making that statement, and whether or not someone higher than that person in the organization has effectively disclaimed that statement. In some of those cases, the election has not been overturned. But where it is not disclaimed or with someone with a higher level of information or claiming to have a higher level of information rebuts the disclaiming, then the disclaimer is not efficient, and we are back to the stage where we have the threats and intimidation.

Mr. SCOTT. Exactly how do the new proposed rules change any of that?

Ms. SENCER. In some degree, they won't address too much of that, other than the timeframe. The studies show and my experience shows that the longer a petition is pending before the election is held, the more likely you are to have these types of situations where threats are made. In one case that I can think of that had been going on for an extended period of time due to pre-election litigation, two days before the vote the employer fired one of the main union supporters in a very public way on a claim that they had been involved in harassing another employee. The video evidence shows there was no such interaction. But at that point, the damage had already been done. The election wound up being invalid and, due to situations beyond either the employer or the union's control, was never rerun because the facility was sold.

Mr. SCOTT. Now, a comment was made about the ability of the organizing to contact members of the bargaining unit. Can you comment on whether or not technical things, like an email address not being correct, could be cause for overturning an election?

Ms. SENCER. In my experience the Excelsior list that unions currently get with the home addresses, it frequently has inaccuracies. When an inaccuracy is found, the union raises it to the region. The region raises it to the employer, and the employer has an opportunity to try to cure the list. I have never seen a case that is actually overturned because of poor addresses on the Excelsior list as much as I would like to have seen it overturned on that.

If the employer does not have certain types of information, the employer, under the proposed rules, would not be required to gather that information. So if you don't gather email addresses, the employer would not be required to go solicit email addresses from its employees in order to put them on the list. They are only required to provide the information that they have. And it is presumed, because the standards required by the *Fair Labor Standards Act,* that every employer already has the home addresses of employees and is ready to provide those.

Mr. SCOTT. How difficult is it to provide, if you have the list, other than just run off the list? Is it logistically difficult to provide such a list?

Ms. SENCER. Generally not. Almost every employer of any size uses an electronic database to do its payroll at this point anyway. If you are producing electronic payrolls, you already have those addresses that are required to be on the pay stub in an electronic format. If you have any size employer, I mean, I cannot imagine actually looking at LaRosa's with 1,200 employees, that it doesn't have the home addresses and the phone numbers for these variable shift employees already in an electronic format that could be pulled and submitted to the region.

Mr. SCOTT. Can you say a word about the privacy of the workers when the information is released?

Ms. SENCER. I am not aware of any cases where the information has been released where it has been used for improper purposes. I understand that Mr. Messenger believes that he has a case about that. The employer has this information already. We do not see the employers abusing it because the employees would rightfully be upset. The same would be true if the union disclosed that information. But the union doesn't, because it is in the union's interest to

make sure this information is only used in the appropriate manner, because this is a group of people that they are trying to convince that they are the right choice for. It doesn't make any sense to disclose that information, and I am not aware of those types of disclosures ever happening.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman KLINE. I thank the gentleman.

Dr. DesJarlais, you are recognized.

Mr. DESJARLAIS. Thank you, Mr. Chairman.

And thank you to all of our witnesses for appearing here today. I appreciate that.

Recently workers at the Volkswagen plant in Chattanooga, many who lived in my neighboring Fourth District, voted against unionizing their workforce. It was encouraging to see a free and robust debate concluded by a fair secret ballot election.

Workers deserve access to a broad spectrum of ideas with which to make their decisions whether or not to unionize. Unfortunately, under the recently repurposed rules, future debates like these could be limited, forcing employees to make incredibly important decisions without the benefit of full accounting of the facts.

Mr. Messenger, under current law, what can a union do or say to employees during an organizing campaign?

Mr. MESSENGER. Effectively anything that is not a direct threat. Board law provides that if a union makes a promise or a threat, it is only considered actionable or objectionable if the union can actually carry it out, the threat. And the board has held that if a union makes promises about what it is able to do, the union is not actually able to do it; it is contingent upon future bargaining. So a union is effectively able to promise virtually anything it wants or predict any dire consequences that it wants as the result of unionization.

Basically, one of the few things a union can't do is directly threaten an employee, because it could carry that threat out. But other than, that the union is generally free to state whatever it likes about future consequences of unionization.

Mr. DESJARLAIS. What resources do employees have to kind of separate the facts from the rhetoric?

Mr. MESSENGER. Only information that they received from other parties, their coworkers, for one. But also a very important source of information is their employer. And under these rules, the employers have very little time to prepare for a campaign and get out information, which is particularly difficult for employers, because unlike unions, there is a host of restrictions on what employers can say. It is a virtual land mine, or minefield, of things they can say wrong that can be considered unfair labor practices or to taint the election. So they need to hire labor counsel and all the rest to prepare to be able to get out what information they can. And these rules significantly shorten the timeframe for them to be able to do that and thus diminish the amount of information that employees have available to them.

Mr. DESJARLAIS. In your experience, do unions routinely provide employees they seek to organize information about itself or themselves?

Mr. MESSENGER. Only favorable information that presents them in a good view. Unions are ultimately campaign organizations, and what they do, it is what they do for a living or as a business. So they test what they do, and they only present what they think will be effective in ultimately getting an employee to sign a card or to vote for them. They are under no obligation to provide any other information about the downsides of unionization or anything that is even fair or balanced.

Mr. DESJARLAIS. Do you find that they would usually disclose their constitutions, their bylaws, results of unfair labor practice charges, results of negotiations for first contracts, past records with other employees, bargaining history or things of that sort?

Mr. MESSENGER. No, unless the union believes that one of those facts that it can cherry-pick out will make it look favorable to the employees it is trying to unionize. But it certainly doesn't fully disclose the pros and cons of unionization, only the pros.

Mr. DESJARLAIS. Ms. Davis, would you add anything to that?

Ms. DAVIS. I would certainly agree to that, based on my experience. Normally the responsibility for educating the employees about the list of items that you just read off rests with the employer, not with the union.

Mr. DESJARLAIS. Okay. That is all I have.

Chairman KLINE. I thank the gentleman.

Mr. Tierney, you are recognized.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Messenger, I would like to read a brief passage to you. I quote, "an appearance of government neutrality is just as necessary for free and fair elections as is the appearance of Board neutrality. Failure to require it in Board certification elections will open the floodgates to interference by Federal, State, and local officials seeking to curry favor with union officials or employers. In order to protect employee free choice and to protect the Board's exclusive jurisdiction over representational proceedings, it is imperative that the Board find objectionable conduct by government officials that can be construed as a State action in support of a union."

Do you agree with that statement?

Mr. MESSENGER. It depends on its context, and I think I may know where that is from.

Mr. TIERNEY. Well, that is right. And the context was in the very amicus brief that you signed on October 26, 2007, urging the National Labor Relations Board to set aside the results of the union election conducted at Trump Plaza in March of that same year.

Mr. Chairman, I ask unanimous consent that the amicus brief to which I am referring be entered in the record.

Chairman KLINE. Without objection.

[The information follows:]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TRUMP PLAZA ASSOCIATES d/b/a TRUMP PLAZA HOTEL AND CASINO	)	
	)	Case No. 4-RC-21263
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED AMICUS BRIEF

Mark Mix, President of the National Right to Work Legal Defense Foundation, moves for leave to file the attached amicus brief in the above captioned case. Mr. Mix was granted leave to file an amicus brief with the Administrative Law Judge ("ALJ") because the subject matter of Mr. Mix's unfair labor practice charge in *Int'l Union, UAW (Trump Plaza and Hotel)*, Case 4-CB-9834, is being resolved in this representational case. (*See* AJLD 1, n.1) ("I grant the motion and accept the brief because of the relationship between the objection and the charge and because it is in the interest of the deciding official to have the benefit of the brief.").[1] It is respectfully requested that the Board grant Mr. Mix leave to file the attached

[1] The Regional Director of NLRB Region 4 is holding Mr. Mix's charges in Case 4-CB-9834 in abeyance pending disposition of election objections in Case No. 4-RC-21263 because "[t]he objections and unfair labor practice allegations . . . are coextensive and the outcome of the representation case will, after Board review, likely provide an appropriate basis for resolving the unfair labor practice case." May 2, 2007, Order of NLRB Region 4 in Case 4-CB-9834.

amicus brief for the same reasons.

Respectfully submitted this 26th day of October, 2007.

/s/ William L. Messenger
William L. Messenger
Counsel for Proposed Amici Mark Mix, President, National Right to Work Legal Defense Foundation

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TRUMP PLAZA ASSOCIATES d/b/a TRUMP PLAZA HOTEL AND CASINO	)	
	)	Case No. 4-RC-21263
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	

AMICUS BRIEF OF MARK MIX, PRESIDENT, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

Mark Mix, President of the National Right to Work Legal Defense Foundation, files this amicus brief in support of the Employer's Exceptions to the Election Results. It is urged that the Board hold that conduct by government officials is objectionable if the conduct can be construed by employees as an official state action in support of a union, as opposed to a personal opinion by the official.

There is a firm distinction between statements made by government officials in their personal capacity and in their official capacity. The former are merely the opinion of an individual. The latter constitute the position of the government.

The Board has recognized this distinction in the context of Board elections. Statements by government officials that employees will construe "as the personal expression of a political and partisan being speaking for herself" are not objectionable. Chipman Union, Inc., 316 NLRB 107 (1995). By contrast, conduct

that employees may construe as a state action in support of a union are objectionable. *See* Columbia Tanning, 238 NLRB 899 (1978).

In this case, Congressman Robert Andrews did not merely state that he supported the International Union, UAW ("UAW"). He purported to "certify" the UAW's majority status shortly before a Board election, and attested that this verification was "in accordance with NLRB rules."

Employees could reasonably believe that this "certification" by a federal official had a definitive legal effect—i.e., that the UAW was certified as their representative under the authority of law. Indeed, Congressman Andrew's certification of the UAW could have had this legal effect and rendered the Board's election moot. Accordingly, Congressman Andrew's ersatz "certification" of the UAW constituted objectionable conduct that destroyed the laboratory conditions necessary for a free and fair election.

It is imperative that the Board find that this type of conduct objectionable to protect its exclusive jurisdiction over representational proceedings from encroachment by federal and state officials. Otherwise, politicians can (and will) use the authority of their office to mislead employees that the government requires or favors a particular result in Board certification elections.

THE FACTS

The *amici* adopts the facts as stated in the Employers' Brief in Support of its Exceptions. Briefly stated, the UAW conducted a public ceremony with Congressman Robert Andrews shortly before a Board certification election at Trump Plaza Hotel and Casino ("Trump Plaza"). At this event, Congressman Andrews "certified" that a majority of Trump Plaza's dealers had authorized the UAW to be their collective bargaining representative by signing a document that states:

> CERTIFICATION OF MAJORITY STATUS
>
> We, the undersigned, conducted a confidential examination of Union authorization cards for the purposes of determining whether a majority of full time and regular part-time dealers, dual rate dealers, and dual rate supervisors at Trump Plaza Hotel and Casino have authorized the International Union, UAW ("UAW") to represent them in collective bargaining.
>
> The verification of the Union's majority was conducted by means of a comparison of a copy of the original signed cards and a list of current eligible employees in the bargaining unit provided by Trump Plaza Hotel and Casino to the Union in accordance with NLRB rules.
>
> The undersigned certify that, based on a confidential examination of cards, as described above, the majority of Trump Plaza Hotel and Casino full time and regular part-time dealers, dual rate dealers, and dual rate supervisors have authorized the UAW to represent them for the purpose of collective bargaining.

(hereinafter "Certification of Majority Status").

ARGUMENT

I. Conduct by Government Officials Is Objectionable If It Can Be Construed by Employees as Constituting An Official State Action, as Opposed to the Personal Action of the Government Official

The Board recognizes that conduct that employees may reasonably construe as a state action in favor of a union are objectionable, while conduct that employees will recognize as being that of a private party are not objectionable. This distinction is equally applicable to conduct by government officials during Board elections. Conduct by government officials that carries the imprimatur of state authority are objectionable, while statements that employees will recognize as the personal opinion of the official are not objectionable.

The Board's general rule is that, "[a]s long as the campaign material is what it purports to be, i.e., mere *propaganda of a particular party*, the Board [will] leave the task of evaluating its contents solely to the employees." Midland National Life Insurance Co., 263 NLRB 127, 131 (1982) (*quoting* General Knit of California, 239 NLRB 619, 629 (1978) (Member Penello dissenting) (emphasis added). However, campaign material that is not readily identifiable as the "propaganda of a particular party," but rather appear to be the work of the government, is objectionable if misleading or otherwise coercive.

For example, use of altered NLRB election ballots during election campaigns is objectionable if employees could reasonably believe that the altered ballot is from the Board, but is not objectionable if employees would recognize that the altered ballot is the work of a private party. *See* Service Corp. Int'l d/b/a Oak Hill Funeral Home and Memorial Park, 348 NLRB No. 35 (2005), *enforced* 495 F.3d 681 (DC. Cir. 2007); Sofitel San Francisco Bay, 343 NLRB 769 (2004). "The crucial question should be whether the altered ballot in issue is likely to have given voters the misleading impression that the Board favored one of the parties to the election. When it is evident that the altered ballot is the work of a party, rather than the Board, employees are perfectly capable of judging its persuasive value." SDC Investment, 274 NLRB 556, 557 (1985).

The same distinction between official state action and private action applies to conduct by government officials in conjunction with Board elections. Conduct that employees may construe as an official state action in support of a union are objectionable. For example, in Columbia Tanning, 238 NLRB 899 (1978), the Board found that a letter written by a Massachusetts Commissioner of Labor to be objectionable because it "improperly suggests governmental approval of the [union]." Id. at 900.

By contrast, statements that employees will construe as the personal opinion of a government official are not objectionable because they do not convey an imprimatur of state authority. For example, in Chipman Union, Inc., 316 NLRB 107 (1995), the Board held that a letter by a Congresswoman to employees was not objectionable because the letter merely indicated her general support for unionization. Id. "[E]mployees would not reasonably construe the foregoing [communication] as an official institutional endorsement by the Federal Government." Id. Instead, employees would interpret the Congresswoman's statement of support for the union "as the personal expression of a political and partisan being speaking for herself." Id..[1]

This distinction was recognized by former Board Chairmen Hurtgen in Saint Gobain Abrasives, 337 N.L.R.B. 82, 82-83 (2001). In that case, a Congressman campaigned for a union during a Board election. Chairman Hurtgen stated that he did "not question the right of Congress-persons to campaign for one side or the other in connection with a National Labor Relations Board election." Id. at 82. However, he would have found the Congressman's statements regarding what

[1] *See also* Usery Companies, 311 NLRB 399 (1993) (letter from Congressman supporting a union was not objectionable because employees could "identify the Union as the source of the document in question").

federal law permits during organizing campaigns to be objectionable because "employees are likely to view that statement as definitive." Id. at 82.

In short, the dispostive question regarding conduct by government officials during Board elections is whether, as a result of the conduct, "it can be said that the Board or the United States favors one party to the election." Usery Companies Inc., 311 NLRB 399 (1993). As established below, Congressman Andrews "certification" of the UAW is objectionable because employees could reasonably construe it to mean that the UAW had been designated as their collective bargaining representative under authority of federal law.

II. A Federal Official Certifying A Union as Employees Collective Bargaining Representative Is Objectionable Because Employees Could Reasonably Believe That the Certification Has Legal Effect

Congressman Andrew's "certification" of the UAW is objectionable because Trump Plaza's employees could tend to believe that it constituted a state action that bestowed the UAW with the legal authority to act as their collective bargaining representative, which would render the Board's certification election moot. It is improbable that these employees would construe a federal official's certification that they "have authorized the UAW to represent them for the purpose of collective bargaining" as a mere statement of personal support for the union.

Congressman Andrews signed a document literally entitled "*Certification* of Majority Status" that purported to "*certify* that . . . [employees] have authorized the UAW to represent them for the purpose of collective bargaining." (emphasis added). "Certification" of a union is the exclusive province of the government. Only the Board can "certify" that a union enjoys majority employee support, and "certify" a union' status as a collective bargaining representative. *See* 29 U.S.C. 159(c). The UAW having a federal official "certify" the union's majority status clearly has the tendency to mislead employees that this "certification" was done under authority of federal law.

Moreover, the "Certification of Majority Status" states:

> The **verification of the Union's majority** was conducted by means of a comparison of a copy of the original signed cards and a list of current eligible employees in the bargaining unit provided by Trump Plaza Hotel and Casino to the Union **in accordance with NLRB rules**.

(emphasis added). By stating that the verification of the UAW's majority status was " in accordance with NLRB rules," this ersatz "certification" was expressly cloaked with the false imprimatur of legal authority.

Indeed, Congressman Andrews' certification could have had the legal effect of making the UAW the employees' exclusive representative if Trump Plaza had accepted this "certification"—i.e., recognized the UAW based on the card count.

Since the Board's certification election could have been rendered moot by Congressman Andrews' certification under certain circumstance, it certainly was reasonable for employees to believe that it actually had this legal effect.

A sham certification by a federal official is far more egregious conduct than that at issue in Usery Companies, Chipman and Saint-Gobain, in which politicians merely stated their support for a union. Employees could reasonably construe a politician's statement of support for a union "as the personal expression of a political and partisan being speaking for herself." Chipman, 316 NLRB at 107; *accord* Usery Companies, 311 NLRB at 399; Saint-Gobain, 337 NLRB at 82.

By contrast, Trump Plaza's employees could not reasonably interpret Congressman Andrew's "certification" that a majority of employees "have authorized the UAW to represent them for the purpose of collective bargaining" as merely being a statement of personal support by the Congressman for the UAW. Employees could reasonably believe that the UAW had actually been "certified" as their collective bargaining representative under authority of law and that the Board's certification election was a nullity. As such, the Congressman's ersatz certification constitutes objectionable conduct that destroyed the laboratory conditions necessary for a free and fair election.

III. The ALJ Erred by Focusing on Whether Employees May Have Construed The Certification As Being An Action by the Board

The basis of the Administrative Law Judges ("ALJ's") recommended decision is that employees could not reasonably believe that Congressman Andrew's "certification" of the UAW was an action by the Board. (*See* ALJD, 6-8). This conclusion is inapposite irrespective of its truth or falsity,[2] for conduct is objectionable if its carries the false imprimatur of *government* authority, not merely Board authority. *See* Usery Companies, 311 NLRB at 399 (the concern is "under what circumstances it can be said that the Board *or the United States* favors one party to the election") (emphasis added).

For example, assume that the Governor of a state informed employees shortly before a Board election that state law required that they choose a union for collective bargaining. It is unlikely that employees will confuse the Governor of their state with the Board. Yet, the Governor's statement would surely constitute

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[2] The ALJ's grounds for reaching his conclusion are erroneous because he attempts to have it **both ways** with respect to the language used in the "Certification of Majority Status" signed by Congressman Andrews. The ALJ states that employees would construe the term "certification" to have "a **generic meaning** far beyond that used in Board parlance for the verification of election results." (AJLD, 7) (emphasis added). But, the ALJ then finds that the employees would construe the phrase "in accordance with NLRB rules" to have its **technical meaning** under Board law of a comparison of union cards with employee lists. (*See* ALJD, 8). Of course, it is untenable to presume that employees will be simultaneously ignorant and knowledgeable about the complexities of Board law.

objectionable conduct because employees would reasonably believe that they were required by state law to select the union.

Here, Congressman Andrew's "certification" of the UAW is objectionable irrespective of whether employees may believe that he acted on behalf of the Board. Employees certainly know that the Congressman is part of the federal government. As such, employees could believe that his "certification" that a majority of employees "have authorized the UAW to represent them for the purpose of collective bargaining" had the legal effect of designating the UAW as their representative under authority of federal law.

IV. The Board Must Protect Its Exclusive Jurisdiction Over Representational Proceedings From Political Interference

It is imperative that the Board find Congressman Andrew's conduct to be objectionable to prevent similar interference by federal and state officials in Board election campaigns the future. Otherwise, any government official —Congressman, governor, mayor, or bureaucrat—could falsely "certify" that a majority of employees have selected a union to be their exclusive representative prior to a Board election meant to resolve that very issue.

Failure to hold that conduct by government officials that carries the imprimatur of state action is objectionable would permit any government official to (mis)use

the authority of their office to influence Board elections. For example, unions could enlist officials from state health or safety departments to inform employees that they need union representation to ensure compliance with health or safety regulations. Employers could enlist a mayor to inform employees that union representation will result in the loss of their employer's contracts with the city. The various manners in which politicians could use the cloak of government authority to mislead employees to vote for or against union representation is endless.

Employees cannot freely choose or reject union representation when federal or state officials inform them that the law requires or favors unionization. While employees may be capable of evaluating the personal opinions of politicians regarding unionization, it is unfair and unreasonable to expect that the same regarding statements made under the cloak of government authority. For example, a governor stating that he supports a union is one thing. But, a governor stating that state law requires union representation is quite another.

An appearance of government neutrality is just as necessary for free and fair elections as is the appearance of Board neutrality. Failure to require it in Board certification elections will open the floodgates to interference by federal, state, and local officials seeking to curry favor with union officials or employers. In order to

protect employee free choice and to protect the Board's exclusive jurisdiction over representational proceedings, it is imperative that the Board find objectionable conduct by government officials that can be construed as a state action in support of a union.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Board find merit to the Employer's Election Objections, hold that conduct by government officials is objectionable if it can be construed by employees as an official state action in support of a union, and set aside the results of the election conducted at Trump Plaza on March 31, 2007.

Respectfully submitted this 26th day of October, 2007.

/s/ William L. Messenger
William L. Messenger
Counsel for Proposed Amici Mark Mix, President, National Right to Work Legal Defense Foundation

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of October 2007, I filed the foregoing Motion for Leave to File Amicus Brief and Proposed Amicus Brief electronically with the Board and caused a copy thereof to be served via First Class United States Mail, postage pre-paid to:

Theodore M. Eisenberg, Esquire Fox Rothschild LLP 75 Eisenhower Parkway Roseland, NJ 07068 William T. Josem, Esquire Cleary & Josem One Liberty Place 1650 Market Street, 51st Floor Philadelphia, PA 19102-4097	Henry R. Protas Counsel for Regional Director NLRB Region 4 615 Chestnut Street, 7th Floor Philadelphia, PA 19160 /s/ William L. Messenger William L. Messenger

Mr. TIERNEY. And I would also ask that the record reflect that Mr. Messenger signed that brief in his capacity with the National Right to Work Legal Defense Foundation, which he is representing here today.

Chairman KLINE. Without objection.

Mr. TIERNEY. Thank you.

So, Mr. Messenger, in your brief, you will recall that you took issue with our former colleague Rob Andrews and his, to quote your words in the amicus brief, "objectionable conduct that destroyed the laboratory conditions for a free and fair election." Is that correct?

Mr. MESSENGER. Yes. But the situation is rather distinguishable.

Mr. TIERNEY. That is exactly how you put it in that case. I am just quoting you on your brief.

Has the National Right to Work Legal Defense Foundation issued any formal statement criticizing Senator Corker's statement and criticizing Senator Corker for using his authority to influence the recent UAW Volkswagen union election in Chattanooga?

Mr. MESSENGER. Not to my knowledge.

Mr. TIERNEY. Okay. So I am asking you now to explain to us how what former Representative Andrews said or did constituted, in your words, objectionable conduct, but what Senator Corker said doesn't?

Mr. MESSENGER. Because what happened in Representative Andrews' situation is that he took an action that could be construed as having legal effect. Mainly two to three days before an election at Trump Plaza amongst dealers, he and the UAW conducted a ceremony in which he certified that the union was actually the majority of the employees based upon cards.

Mr. TIERNEY. Now, if I direct you to Senator Corker's statement, he says "I have had conversations today and, based on those, am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new midsized SUV here in Chattanooga."

It sounds like he has some pretty official inside information that he is imparting and sounds that, as a United States Senator, that maybe he has the authority to do something about it, wouldn't you agree?

Mr. MESSENGER. Not authority to do something about it. Volkswagen will determine where it puts its SUVs.

Mr. TIERNEY. Let me ask, Ms. Sencer, these statements were made really close to the election date itself, correct?

Ms. SENCER. They were actually made during the course of the election.

Mr. TIERNEY. During the course of the election, and that is why the newspapers reported it as a bombshell, right?

Ms. SENCER. Yes. Probably.

Mr. TIERNEY. Now, if the CEO of the company had made that statement, would it have been an unfair labor practice?

Ms. SENCER. Yes, and most likely—well, they wouldn't have to show that it was an unfair labor practice. They would only have to show that it was objectionable to affect the election. But it most likely also would be an unfair labor practice.

Mr. TIERNEY. Now, Senator Corker's statement was refuted by Mr. Fisher, the chief executive, right after he said it or close to the time he said it?

Ms. SENCER. Yes.

Mr. TIERNEY. But, then again, we see Senator Corker purports to have better information—

Ms. SENCER. Yes.

Mr. TIERNEY.—than the CEO of the corporation. So does that then nullify what Mr. Fisher tried to do?

Ms. SENCER. It is, because Mr. Corker then said that I have new talking points as compared to Mr. Fisher's old talking points.

Mr. TIERNEY. So, in your estimation, is it likely there could be a challenge that there was an unfair labor practice involved here?

Ms. SENCER. There is likely to be a challenge of that. And that is part of the basis from the objections, from what I understand.

Mr. TIERNEY. And, in your opinion, is that challenge likely to be successful?

Ms. SENCER. As to the objections to the election, I would think that it probably will be.

Mr. TIERNEY. Thank you.

I have no further questions. Yield back.

[Additional Submissions by Mr. Messenger follow:]

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The Honorable John Kline
Chairman, Committee on Education & the Workforce
U.S. House of Representatives
2181 Rayburn House Office Bldg.
Washington, DC 20515-6100

March 13, 2014

Re: Supplemental Testimony of William L. Messenger

Dear Chairman Kline:

Thank you for the opportunity to testify before the Committee on Education and the Workforce at its March 5, 2014 hearing regarding the Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule. Please accept the following as my supplemental testimony for inclusion into the hearing record.

This supplemental testimony addresses a question I was asked at the hearing: why did statements by Representative Rob Andrews interfere with the election conducted at Trump Plaza in Atlantic City, New Jersey in March 2007, while statements by Senator Corker did not interfere with the election conducted at a Volkswagen facility in Chattanooga, Tennessee in February 2014. In short, Representative Andrew's ersatz certification of the UAW before an election could be mistaken by employees as nullifying their forthcoming election, while the same cannot be said of Senator Corker's statement.

The courts and the National Labor Relations Board have recognized that "[a] public official's involvement in an election campaign is not by itself objectionable" because "'public officials . . ., like other third parties, are not required to remain neutral and may properly seek to persuade employees.'" *Trump Plaza v. NLRB*, 679 F.3d 822, 827 (D.C. Cir. 2012) (quoting *Affiliated Computer Servs., Inc.*, 355 NLRB No. 163, at *2 (2010). Thus, the Board has repeatedly held that statements by members of Congress supporting a union in an election are not objectionable conduct. *Id.* at 828; *see also Chipman Union, Inc.*, 316 NLRB 107 (1995); *Saint Gobain Abrasives*, 337 NLRB 82, 82-83 (2001).

Representative Andrew's actions in the Trump Plaza election, however, went far beyond merely expressing support for the UAW or predicting that unionization would be beneficial to employees. In that case, a few days before the election was held, Representative Andrews and others certified that a majority of Trump Plaza dealers had authorized the UAW to be their union representative by signing a document that states:

CERTIFICATION OF MAJORITY STATUS

We, the undersigned, conducted a confidential examination of Union authorization cards for the purposes of determining whether a majority of full time and regular part-time dealers, dual rate dealers, and dual rate supervisors at Trump Plaza Hotel and Casino have authorized the International Union, UAW ("UAW") to represent them in collective bargaining.

The *verification of the Union's majority* was conducted by means of a comparison of a copy of the original signed cards and a list of current eligible employees in the bargaining unit provided by Trump Plaza Hotel and Casino to the Union *in accordance with NLRB rules.*

The undersigned *certify* that, based on a confidential examination of cards, as described above, the majority of Trump Plaza Hotel and Casino full time and regular part-time dealers, dual rate dealers, and dual rate supervisors *have authorized the UAW to represent them for the purpose of collective bargaining*.

(Emphasis added). Representative Andrew's pre-election certification of the UAW as the employees' union representative was disseminated both by the UAW and the media. *See Trump Plaza*, 679 F.3d at 825-26, 830.

As explained in detail in the National Right to Work Foundation's amicus brief in the *Trump Plaza* case, which was entered into the record during the hearing, this ersatz certification of the UAW interfered with the Board's election because employees could reasonably believe that the election was now a nullity—*i.e.*, the UAW had already won. Indeed, if Trump Plaza had accepted Representative Andrews' certification by recognizing the UAW, the election would actually have been called off. By certifying the UAW as the winner of the Trump Plaza organizing campaign before the election was even held, Representative Andrews interfered with the election process itself.

Senator Corker, by contrast, did not interfere with the election conducted at Volkswagen's facility in Chattanooga. If anything, his comments facilitated an informed debate about unionization that was otherwise being stifled by Volkswagen and the UAW.

Volkswagen and the UAW are parties to an Agreement for a Representation Election, which is attached hereto, under which Volkswagen agreed to assist the UAW with unionizing its employees. Among other things, the company agreed to conduct and pay its employees to attend in-plant captive audience meetings with the UAW, *id.*, § 5(d), and to give UAW organizers an office and use of other areas in the plant to conduct their organizing activities. *Id.*, § 5(c). Volkswagen further agreed to "not [to] take a position opposed to . . . [UAW] representation," to train its supervisors not to oppose the UAW, and to "not make any negative comments (written or verbal) against the UAW." *Id.*, §§ 5(b), (5)(f), 9. Finally, Volkswagen and the UAW agreed to spring an ambush election on

employees with only nine (9) days of notice to them. *Id.*, § 3(a). The combined effect of Volkswagen and the UAW's collusive efforts was to ensure that the UAW could deliver its message to employees, while diminishing the amount of information that employees would receive about the downsides of UAW representation, before being forced to vote.

Moreover, prior to the election, it was reported that "a high-ranking labor leader who sits on VW's supervisory board told a German news agency that the board wouldn't authorize the addition of a second assembly line at the $1 billion Chattanooga plant or any new product until the plant joins the works council that represents all of VW's other assembly plants." Amy Wilson, *Automotive News*, June 24, 2013.[1] The UAW seized on these remarks, and used them to argue that Chattanooga employees needed to join the UAW if they wanted new products produced at their plant. *See e.g., id.*

It was within this context that Senator Corker stated that "I've had conversations today and based on those am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga."[2] Thus, Senator Corker was attempting to *dispel* the notion that the election would determine if the SUV line is manufactured in Chattanooga. As the Senator explained:

> Since last June and through the election, the UAW tried to press the narrative that any future expansion of the plant would be contingent upon the UAW organizing the employees. To counter those purposefully inaccurate assertions, and based on years of experience and relationships with the company, I sought to assure the workers that Chattanooga would be Volkswagen's first choice for the new SUV line even if they did not choose to have the UAW represent them.

Senator Bob Corker, *Wall Street Journal*, Mar. 3, 2014.

Senator Corker's statement, far from interfering with the election at Volkswagen, had the beneficial effect of ensuring that employees heard both sides of the story on this subject. His statement was consistent with Congress' intent in the National Labor Relations Act to encourage "'uninhibited, robust, and wide-open debate in labor disputes,'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008) (citation omitted), and to facilitate employees' "underlying right to receive information opposing unionization." *Id.* "It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971).

An analogy to political campaigns makes plain the distinction between Senator Corker's statement and Representative Andrew's mock certification. In campaigns for political

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[1] Available at http://www.autonews.com/article/20130624/OEM01/306249959/an-ultimatum-for-vw-chattanooga# (last visited Mar., 12, 2014).

[2] See http://www.corker.senate.gov/public/index.cfm/2014/2/corker-conversations-today-indicate-a-vote-against-uaw-is-a-vote-for-suv-production (last visited Mar. 12, 2014).

office, it is common for some to assert that electing Candidate A will bring more business activity to an area, while others assert that it will not. No one would ever claim that such assertions and counter-assertions justify overturning the results of an election. The speech would be part of the open and robust debate that is the cornerstone of our democracy. Senator Corker's rebuttal of the notion that voting for the UAW was necessary to bring more business to the Chattanooga plant is free speech of this variety.

However, it would be another thing entirely if, a few days before an election, a public official falsely certified that voters chose Candidate A for office and disseminated this message to potential voters. The mock certification would convey the false impression that the election is already over, and suppress turnout amongst supporters of Candidate B. This would not be appropriate campaign activity. It would be election fraud. Individuals have been criminally convicted for engaging in such activities. *See* John Wagner, *Ex-Ehrlich Campaign Manager Schurick Convicted in Robocall Case*, Washington Post, Dec. 6, 2011 (individual convicted for approving robocalls that falsely told potential voters, before the election was over, that "that Governor O'Malley and President Obama have been successful" in their election bids, so as to decrease turnout).[3] Representative Andrew's pre-election certification that the UAW was the chosen representative of Trump Plaza's employees is of this ilk. This conduct warrants overturning the results of the election conducted amongst those employees.

Thank you for the opportunity to submit this supplemental testimony into the record.

Sincerely,

/s/ William L. Messenger
William L. Messenger

Staff Attorney, National Right to Work Foundation

[3] Available at http://www.washingtonpost.com/local/dc-politics/ex-ehrlich-campaign-manager-schurick-convicted-in-robocall-case/2011/12/06/gIQA6rNsaO_story.html (last visited Mar. 12, 2014).

AGREEMENT FOR A REPRESENTATION ELECTION

This Agreement for a Representation Election ("Election Agreement") is made as of this 27th day of January 2014, by and between International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW" or the "Union") and Volkswagen Group of America, Inc. on behalf of itself and its wholly-owned subsidiary Volkswagen Group of America Chattanooga Operations, LLC, referred to in this Election Agreement as "VWGOA," in connection with the UAW's request that VWGOA recognize it as the exclusive bargaining representative of a unit of Production and Maintenance employees employed by VWGOA (the "Hourly Unit") at VWGOA's facility located at 8001 Volkswagen Drive, Chattanooga, Tennessee 37416 (the "Chattanooga Plant") and the parties' agreement that a Question Concerning Representation ("QCR"), as that term is used in the administration of the National Labor Relations Act (the "Act") therefore exists, that said QCR shall be resolved, absent mutual agreement otherwise, through an expedited representation election conducted by the National Labor Relations Board (the "NLRB") in accordance with the terms of this Election Agreement, and as to certain shared principles that the UAW and VWGOA agree shall form the basis for their conduct, activities and relationship between the date of this Election Agreement and such NLRB-conducted representation election, and their future relationship and understandings in the event that either the UAW is certified by the NLRB as the bargaining representative of the Hourly Unit or the UAW does not receive a majority of the valid ballots cast.

WHEREAS, Volkswagen Group of America, Inc. a wholly owned subsidiary of Volkswagen AG, a German corporation, is engaged in the manufacture, import, sale and distribution of high quality automobiles; and

WHEREAS, VWGOA recognizes, supports and has adopted the principles, as affirmed in VWAG's Global Labour Charter on Labour Relations (the "Global Labour Charter") and Declaration on Social Rights and Industrial Relationships at Volkswagen Group (the "Declaration on Social Rights"), of employee participation and co-determination through the establishment and operation of a vibrant employee works councils and the

participation of such works councils in the Volkswagen Group Global Works Council, in a manner consistent with all relevant U.S. labor and employment laws; and

WHEREAS, VWGOA has adopted and supports the principle, as recognized in the Global Labour Charter, that maintaining sustainable corporate governance and Human Resources policies founded on a performance-based and participatory culture will help VWGOA, as it has other companies within the Volkswagen Group in other countries, contribute to securing and promoting competitiveness and economic efficiency while also helping to secure and develop jobs and workforce employability and that these principles are the basis for an appropriate means of addressing the challenges of market competition and of accommodating defined standards of labor relations within VWGOA, as they do elsewhere with the Volkswagen Group; and

WHEREAS, in the context of the Volkswagen Group's performance-based participatory culture, "Performance" stands for the active, competent and committed contribution by the workforce, employee representatives and management toward the collective success of the enterprise, "Participatory" means that the workforce is actively incorporated into the development of the organization, with employees making their contributions to the continual improvement of processes and working conditions and having a stake in the success of the enterprise, and "Participation" is characterized by co-operative, respectful interrelations among the parties concerned and by the understanding that all parties share responsibility for the enterprise and the workforce and therefore that the active definition and exercising of participation rights creates an innovative factor for successful development of the organization; and

WHEREAS, VWGOA has informed employees at the Chattanooga Plant that it believes the establishment of a works council at the Chattanooga Plant modeled upon those at plants of the Volkswagen Group in Germany and other countries, modified and adapted to comply with United States laws and customs, is in the common interest of VWGOA and its employees; and

WHEREAS, the UAW has been and continues to be engaged in an ongoing organizing campaign among the employees employed by VWGOA in the Chattanooga Plant in the Hourly Unit ("Employees"); and

WHEREAS, throughout the course of its campaign to organize the Hourly Unit the UAW has informed Employees and VWGOA that it is familiar with the works councils that exist at Volkswagen Group companies in Germany and elsewhere, the role they play and the voice they provide to all employees, and that the UAW acknowledges, supports and shares VWGOA's commitment to the development of an innovative model of labor relations at the Chattanooga Plant, including the establishment of a works council, in which a lawfully recognized or certified bargaining representative would delegate functions and responsibilities ordinarily belonging to a union to a plant works council that engages in co-determination with the employer, which model of labor relations is referred to in this Election Agreement as the "Dual Model;" and

WHEREAS, the UAW has informed the Employees that if it is recognized or certified as the bargaining representative of the Hourly Unit, it shall be committed to the establishment through collective bargaining of a model of labor-management relations that includes an active and robust Plant Works Council ("Works Council"), and that if such a Works Council is established at the Chattanooga Plant, the UAW would delegate to the Works Council many of the functions and responsibilities ordinarily performed by unions as bargaining representative in the United States, that it shall support the Dual Model as the basis for a relationship with VWGOA and that it is committed to the delegation to the Works Council of certain duties, responsibilities and functions that are traditionally the subject of collective bargaining, with the understanding that such Dual Model shall be included in any and all collective bargaining agreements that the parties may enter into and that the Dual Model shall continue to be followed and maintained at the Chattanooga Plant for so long as the UAW shall represent the Hourly Unit or any other unit of employees at the Chattanooga Plant; and

WHEREAS, the UAW has informed VWGOA that a majority of the Employees employed by VWGOA at the Chattanooga Plant in the Hourly Unit have signed cards

designating the UAW as their representative for collective bargaining and it has asked that VWGOA recognize it as the representative of that unit; and

WHEREAS, VWGOA and the Union agree that a QCR now exists and that it should be resolved through an NLRB-conducted election, in which Employees in the Hourly Unit vote by secret ballot whether they want the UAW to be their bargaining representative; and

WHEREAS, VWGOA and the UAW agree, subject to the terms and conditions of this Election Agreement, that VWGOA shall file an "RM-Representation Petition (Employer Petition)," ("RM Petition") with the NLRB at the time and in the manner described in Paragraph 3(a) of this Election Agreement and they shall jointly request that the NLRB conduct a secret ballot representation election in the Hourly Unit on an expedited basis and they shall enter into a Stipulation for Certification Upon Consent Election ("Stipulation for Certification" or "Stipulation") with the NLRB, pursuant to which the NLRB shall conduct a secret ballot election consistent with the relevant terms agreed to in this Election Agreement and the parties shall cooperate to ensure that the Employees shall be able to freely exercise their right to vote in an informed and free manner, and the parties shall structure their future relationship and dealings following the NLRB's certification of the results of such election, whatever its outcome.

NOW, THEREFORE, in consideration for the mutual promises and commitments set forth in this Election Agreement, including but not limited to the parties' agreement, in the event the UAW is certified as the representative of the Hourly Unit, to support the establishment and perpetuation of the Dual Model and a strong and vibrant Works Council, the parties' mutual representations and warrantees and the other terms and conditions contained herein, which each party acknowledges and agrees are material conditions which each relied upon in entering into this Election Agreement, without which they would not have done so and without which they would not have waived their rights in connection with the campaign, the UAW and VWGOA intending to be legally bound, agree as follows:

1. INCORPORATION OF RECITALS

Each of the preceding recitals is incorporated in and is a part of this Election Agreement as if set forth at length herein.

2. **PARTIES**

This Election Agreement is made and entered into by and between the UAW and VWGOA. The term "UAW" shall be deemed to include the International Union, United Automobile, Aerospace and Agricultural Implement Workers as well as its locals, regions, districts and other sub-units, and any officer, employee, agent or member acting on its behalf. Legal party to this Election Agreement is Volkswagen Group of America, Inc. on behalf of itself and its wholly-owned subsidiary Volkswagen Group of America Chattanooga Operations, LLC. It is understood and agreed that neither any parent of either party nor any other member of the Volkswagen Group is a party to nor bound by this Election Agreement.

3. **PETITION FOR AN NLRB ELECTION**

(a) The parties agree that within seven (7) days following their execution of this Election Agreement they shall together contact the NLRB and inform the Regional Director for Region 10 that (i) the UAW has requested that VWGOA recognize it as the exclusive bargaining representative of the Hourly Unit, (ii) the parties agree that a QCR exists between them and that said QCR should be resolved through a secret ballot election conducted by the NLRB, (iii) the parties have agreed to terms for a secret ballot election to be conducted by the NLRB at the Chattanooga Plant in the Hourly Unit, which terms they agree shall be incorporated in a Stipulation for Certification which the parties are prepared to sign contemporaneously with the filing of an RM Petition by VWGOA with Region 10 of the NLRB or such other office of the NLRB as the NLRB may direct, (iv) the Stipulation for Certification shall provide for the election, to the extent possible, to be conducted by the NLRB on February 12-14, 2014, or such other dates as are mutually agreed between the parties and the NLRB Regional Director, following the Regional Director's approval of the Stipulation for Certification, and (v) that the parties waive their right to a pre-election hearing with respect to the RM Petition.

(b) The parties shall ask the NLRB to conduct the election on three (3) consecutive weekdays, February 12-14, 2014, and shall propose that the NLRB conduct the election in the locations of its choosing at the Chattanooga Plant, with the polls to be open from 5 a.m. to 8 p.m. each day, or such other times as are mutually agreed between the parties and the NLRB Regional

Director, to allow the maximum opportunity for eligible Employees to vote if they wish to exercise their right to vote in the election.

(c) VWGOA agrees that it shall provide the UAW with a list of the names and home addresses of Employees in the Hourly Unit (the "Excelsior List") within twenty-four (24) hours of their signing the Stipulation. In return for VWGOA complying with the foregoing and if the UAW nonetheless receives the Excelsior List fewer than seven (7) calendar days before the date of the election (due to the expedited dates set for the election) then the UAW represents that by entering into this Election Agreement that it clearly and unequivocally waives the balance of the period that it would otherwise be entitled to have the Excelsior List in its possession prior to the election. The UAW agrees that it will not make visits to the homes of Employees unless an Employee has explicitly requested that the UAW make a visit to the Employee's home.

(d) The initial announcement of the reaching of this Election Agreement, the filing of the RM Petition and the terms of the Stipulation for Certification, including the date(s), time(s) and location(s) of the voting if it has been approved by the Regional Director, shall be made by each party at such time(s) as the parties jointly agree. The parties shall also agree on the content of such initial announcement(s) and any accompanying press release(s) to be individually released. The parties agree that they shall coordinate their announcements and statements concerning the subject matter of this Election Agreement, including but not limited to their respective initial announcements to Employees.

(e) Following the signing of the Election Agreement and the NLRB's approval of the Stipulation for Certification the parties will mutually agree on the form of communication for informing the Employees of the parties' Election Agreement and its terms, which will include placement of copies of the Election Agreement on plant bulletin boards.

(f) The parties agree that during the period following their initial announcements they shall advise one another of their planned communication activities and shall seek, as appropriate, to align messages and communications through the time of the election and the certification of the results by the NLRB.

4. **BARGAINING UNIT**

(a) This Election Agreement shall cover the Employees in the Hourly Unit at the Chattanooga Plant, which is composed of all employees employed by Employer in the classifications listed in Exhibit A, or in classifications called by different names when performing similar duties at the Chattanooga Plant. This unit shall be the unit named in the Petition and the Stipulation.

(b) Eligibility to vote shall be in accordance with the standards and practices of the NLRB, and those Employees employed in the Hourly Unit as of the end of the payroll period immediately preceding the approval by the NLRB of the Stipulation for Certification who are employed by VWGOA in positions in the Hourly Unit at the time of the election shall be eligible to vote in the election.

(c) The parties further agree that persons employed by contractors, employee leasing companies, temporary agencies, and other persons supplying labor to VWGOA in connection with operations of any type at the Chattanooga Plant are excluded from and shall not be included in any bargaining unit with respect to which the election may occur under this Election Agreement.

5. **PRE-ELECTION CAMPAIGN PERIOD**

The parties agree that it is their mutual priority that there shall not be any interruption or disruption to production or quality at the Chattanooga Plant or any other interference with the business and operations of VWGOA between the date of this Election Agreement and the election that it contemplates. For the purpose of ensuring an orderly environment for the exercise by the Employees of their rights under Section 7 of the Act and to avoid picketing and/or other economic action directed at VWGOA during the UAW's organizing campaign among the Employees employed in the Hourly Unit, the parties agree as follows:

(a) The parties mutually recognize that national labor law guarantees employees the right to form or select any labor organization to act as their exclusive representative for the purpose of collective bargaining with their employer, as well as the right to refrain from such activity.

(b) The parties and their representatives will communicate with Employees in a non-adversarial, positive manner and will not defame or make any untruthful statements regarding one another or their respective employees and representatives, including locals and affiliates of the UAW and other members of the Volkswagen Group. Neither party nor any of its representatives will interfere with the right of Employees to vote in the election contemplated in this Election Agreement and each party shall respect the right of Employees to decide whether to be represented for purposes of collective bargaining by the UAW. VWGOA shall not take a position opposed to such representation. The parties' communications with Employees shall be consistent with the foregoing.

(c) Beginning with the filing of the Petition and continuing up until 11.59 p.m. the day before the voting begins, VWGOA shall provide UAW access to its premises and the Employees, including access to and use of the room designated "RB2, 009, HR Planning" in the Chattanooga Plant, where the UAW's representatives may meet with interested Employees who elect to discuss the election and the Union with it. Such access shall be limited to persons employed by the UAW. VWGOA shall provide the UAW with access to suitable locations where the UAW may post notices and announcements to Employees and provide the UAW with tables in mutually agreed non-work areas where UAW representatives may make literature available for Employees who wish to receive such materials and speak to Employees who approach them with questions. The UAW agrees that it shall not approach or seek to speak with Employees who do not approach it. The UAW agrees that it shall provide VWGOA with reasonable advance notice, including the name, position and affiliation of its representatives who it proposes to bring into the Chattanooga Plant and VWGOA agrees that it will not unreasonably deny admittance to such persons. Provided, however, in the event of any delay to the election or any of the other events contemplated by this Election Agreement due to any external considerations, the parties shall meet and confer to discuss whether and how such events may affect the terms of this Paragraph 5(c). The UAW acknowledges and agrees that all UAW representatives granted entry to the Chattanooga Plant under this Paragraph 5(c) shall be required to comply with VWGOA's normal requirements and restrictions upon access and admission to the Chattanooga Plant and that persons admitted to the Chattanooga Plant under this Election Agreement shall not be permitted to enter production, manufacturing or other work areas in the Chattanooga Plant.

(d) VWGOA shall schedule and conduct shift meetings for all Hourly Unit Employees on two consecutive dates, during their working time, beginning within two (2) working days of the NLRB's approval of the Stipulation for Certification, unless otherwise agreed to by the parties. At these meetings VWGOA shall communicate to the Employees the organizational framework for the election, the fact that it respects the right of the Employees to decide on union representation, its support for the values described in the recitals above and its views concerning the establishment of a Works Council. Following such introductory remarks by VWGOA, the UAW shall be given the opportunity to speak to the Employees present at the meeting. While the Employees' attendance at the first portion of the meeting during which VWGOA will present to the Employees shall be mandatory, attendance at the second part of the meeting during which the UAW will present to the Employees present shall be voluntary. VWGOA supports the attendance of Employees at the second portion of the meeting during which the UAW shall have the opportunity to address Employees in attendance in order that all Employees have the opportunity to hear the UAW and so that they may make well informed decisions concerning voting in the Election, and so that they may gain a clear understanding what they would be voting on, while agreeing that Employees' attendance and participation shall be voluntary. The parties acknowledge and agree that each such meeting shall last a total of approximately one (1) hour or less. The parties agree that these meetings shall be conducted in a manner so that there is no adverse effect on the business or operations of the Chattanooga Plant.

(e) VWGOA's communications during the period between the date of this Election Agreement and the election contemplated by it shall be consistent with the recitals described above and the right of the Employees to decide by secret ballot election whether they want to be represented by the Union.

(f) VWGOA shall provide appropriate training and counseling for its supervisors and managers at the Chattanooga Plant within two (2) days of the NLRB's approval of the Stipulation with respect to the election and VWGOA's position concerning the election, the Dual Model and VWGOA's positions concerning neutrality and the right of the Employees to decide whether they wish to be represented by the Union.

(g) The parties agree that in order to fulfill their mutual obligations and commitments to ensure a fair election conducted in accordance with the principles set forth in the recitals and the terms of this Election Agreement, each party shall each designate an appropriate representative who shall have responsibility for ensuring compliance with the party's obligations under this Paragraph 5. The parties' designees shall meet and confer as necessary to discuss and address reports of actions inconsistent with the parties' obligations. Each party's designee shall have the authority to promptly investigate and where appropriate and necessary to take appropriate action to address any actions or statements by the parties that are inconsistent with these principles and/or the terms of this Election Agreement and to effect the resolution of such matters. The parties further agree that they shall designate a mutually acceptable neutral person to serve as a mediator or facilitator to be available to assist their designated representatives, if necessary, in resolving such matters as may arise under this Paragraph 5(g) to the extent that they agree is necessary.

(h) VWGOA and the UAW agree that the UAW Principles for Fair Union Elections set forth appropriate practices in connection with a representation election, which reflect the parties' support for allowing employees to decide by secret ballot election whether they wish to be represented. It is agreed that nothing contained in those Principles shall override any provision of this Election Agreement and that in the event of any inconsistency between them, this Election Agreement shall control.

6. POST-ELECTION OBLIGATIONS

(a) The parties agree that following the NLRB election, if the UAW is certified as the representative of the Hourly Unit, they shall promptly confirm their commitment and agreement to the Dual Model and the fact that the Dual Model shall be an integral and fundamental part of their collective bargaining relationship unless and until such time as both parties may agree to modify or discontinue the Dual Model and that the UAW shall, through collective bargaining for an initial collective bargaining agreement, which shall establish the timing and details for the establishment and functioning of the Dual Model, delegate to a Works Council to be established by VWGOA at the Chattanooga Plant certain issues, functions and responsibilities that would otherwise be subject to collective bargaining, consistent with the concepts and principles set forth in Exhibit B to this Election Agreement. It is the express understanding and agreement of

the parties that and any and all future collective bargaining agreements that may be entered into by them shall confirm and maintain their commitment to the Dual Model including the Works Council's role. The parties agree that and the UAW represents and warrants that the UAW's delegation to the Works Council shall be specified and confirmed in the parties' initial collective bargaining agreement and in any and all subsequent renewals, extensions and future agreements, that the Dual Model shall be established, continued and maintained as the status quo and that any future changes to the UAW's delegation to the Works Council and/or to the Dual Model would require the express written agreement of both VWGOA and the UAW and that absent such agreement, the UAW's delegation to the Works Council and their agreement as to the Dual Model shall continue in effect.

(b) If the UAW is certified as the bargaining representative of the Hourly Unit by the NLRB, the parties shall commence negotiations for a collective bargaining agreement, including the establishment of a Works Council, not later than thirty (30) days from the date that the parties receive the Certification of Representative from the NLRB. The parties recognize and agree that any such negotiations for an initial collective bargaining agreement and any future agreements shall be guided by the following considerations: (a) maintaining the highest standards of quality and productivity, (b) maintaining and where possible enhancing the cost advantages and other competitive advantages that VWGOA enjoys relative to its competitors in the United States and North America, including but not limited to legacy automobile manufacturers, and (c) ensuring that the Dual System is successfully implemented and maintained at the Chattanooga Plant, including the parties' continuing obligations as described in the Recitals to this Election Agreement and Paragraphs 6(a) and Paragraph 6(b). The parties agree that as a part of their negotiations for an initial collective bargaining agreement they shall negotiate for the prompt establishment of a Works Council and for its commencement as described in this Election Agreement and shall take all steps necessary to enable the Works Council to be constituted as quickly as possible.

(c) Unless otherwise agreed to by the parties, if the UAW does not receive a majority of the valid ballots cast in the election and the NLRB's final certification of the results of the election does not certify the UAW as the bargaining representative of the Hourly Unit, the UAW (i) shall discontinue all organizing activities at the Chattanooga Plant and all other VWGOA

facilities and locations for a period of not less than one (1) year beginning with the date of the election, (ii) that it shall not make another request for recognition or file a representation petition with the NLRB to seek a representation election in the Hourly Unit or any other unit at the Chattanooga Plant for a period of not less than one (1) year from that date, and (iii) that it shall not engage in or resume any organizing or other activity in connection with the Chattanooga Plant or any other facility or operation of VWGOA for a period of not less than one (1) year from the date of the election. Provided, in the event that another union commences a serious, concerted and legitimate effort to organize the Employees during the period covered by Paragraph 6(c) (iii), the UAW shall, upon notice to VWGOA, be released of its obligations under Paragraph 6(c).

7. NO STRIKE – NO LOCKOUT

While this Election Agreement remains in effect, and if the UAW is certified as the representative of the Hourly Unit, while the parties negotiate for an initial collective bargaining agreement, (a) the UAW will not engage in picketing, strikes, boycotts, or work slowdowns, and (b) VWGOA will not engage in a lockout of Employees. The parties agree that in the event that the UAW is certified as the representative of the Hourly Unit the parties would, if they are unable to reach agreement for an initial collective bargaining agreement in an appropriate period of time, agree to select a mediator or other third party acceptable to both, to assist them in their efforts to timely complete negotiations for a Collective Bargaining Agreement, which may include interest arbitration.

8. TERM

This Election Agreement shall be in full force and effect for a period of one (1) year from the signing of this Election Agreement, or until such earlier date as the parties execute a collective bargaining agreement, which shall supersede this Election Agreement. Provided, the parties further agree that in the event the NLRB conducts a representation election and the NLRB's final certification of the results of the election does not certify the UAW as the representative of the Hourly Unit, VWGOA shall not have any further obligations under this Election Agreement. Provided further, however that in the event of any termination of this Election Agreement following an NLRB election in which the UAW is certified as the

representative of the Hourly Unit, the UAW and VWGOA shall continue to be bound by all obligations under Paragraphs 6 and 7 as well as those contained in the Recitals to this Election Agreement.

9. NO DISPARAGEMENT

The UAW agrees that it will not make any (written or verbal) negative comments about VWGOA, its parents and affiliates, or any other member of the Volkswagen Group or their management or their products. VWGOA agrees that it will not make any negative comments (written or verbal) against the UAW.

10. NO THIRD PARTY BENEFICIARIES

(a) The parties agree that it is their understanding and agreement that there are not intended to be and shall not be any third party beneficiaries to this Election Agreement and that neither Employees nor any other person, party or entity of any type is vested with any right under this Election Agreement. Therefore no party other than the UAW and VWGOA shall have any right to bring any action to enforce any provision of this Election Agreement.

11. NOTICE

Any notice given or required under this Election Agreement shall be in writing and may be sent by overnight delivery service or by email with an immediate overnight copy to follow.

Notice to the Union shall be sent to:

Gary Casteel
Director
UAW, Region 8

With a copy to:

Michael Nicholson, Esq.
General Counsel
International Union, UAW

Notice to VWGOA shall be sent to:

Sebastian Patta
Vice President, Human Resources
Volkswagen Group of America
Chattanooga Operations, LLC

With a copy to:

Steven M. Swirsky, Esq.
Epstein Becker & Green, P.C.

With a copy to:

David Geanacopoulos, Esq.
Executive Vice President, General Counsel
Volkswagen Group of America

12. COMPLETE AGREEMENT

This Election Agreement is the complete agreement of the parties concerning the subject matters hereof. It may not be altered or amended except in a signed writing signed by authorized representatives of the parties.

VOLKSWAGEN GROUP OF AMERICA INC.
signed on January 20, 2014

Michael Horn
President & CEO

Frank Fischer
Chairman & CEO,
Chattanooga Operations LLC

Sebastian Patin
Vice President, Human Resources,
Chattanooga Operations LLC

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

Bob King
President

Dennis Williams
Secretary-Treasurer

Gary Casteel
Director, Region 8

EXHIBIT A

The parties agree that the Hourly Unit shall be described as follows in all filings and agreements, including the RM Petition and the Stipulation for Certification:

All regular full-time and regular part-time production and maintenance employees employed by Volkswagen Group of America at its facility located at 8001 Volkswagen Drive, Chattanooga, TN 37421 (the "Chattanooga Plant"), including Team Members, Skilled Team Members and Team Leaders but excluding all Specialists, Technicians, temporary and causal employees, plant clericals, office clericals, professional employees and managerial employees, engineers, purchasing and inventory employees, all secretarial, office clerical, and all managers, supervisors, and guards as defined in the National Labor Relations Act. Any and all persons employed by contractors, employee leasing companies, temporary agencies, and other persons supplying labor to in connection with operations of any type at the Chattanooga Plant are excluded from the bargaining unit.

EXHIBIT B

DUAL MODEL INCLUDING WORKS COUNCIL

1.1 General Description of the Dual Model

The Dual Model is based on the Volkswagen Culture of cooperative labor relations, which is practiced by companies in the Volkswagen Group all over the world. The Dual Model is intended to adopt the practices of the Volkswagen Group culture to the fullest extent possible, in a manner consistent with all applicable US labor and employment laws.

Under the Dual Model employees are represented by a union for collective bargaining with their employer. They also participate in and receive representation by a Works Council that plays an important role in the day to day operation of the plant. In the Dual Model, the respective roles and responsibilities of the union and the Works Council would be established through collective bargaining between the Company and a Union. They would be defined in an agreement, reached in bargaining between the Employer and the Union and put in writing in a collective bargaining agreement and/or other legally binding written agreements (collectively referred to as a "CBA").

The Dual Model is conceived as a model of labor relations that would allow for development and establishment of a robust Works Council through collective bargaining between the Company and a legally recognized/certified labor union that represents a unit of employees. Under this model, the Union and the Works Council would each have defined roles and responsibilities, which would be established and defined through collective bargaining.

As part of their contract negotiations, the bargaining parties will also negotiate to include in their initial **collective bargaining agreement** the establishment of a Works Council including its organizational framework, and the responsibilities and authorities which will be delegated to the Works Council, as more thoroughly explained below. The parties will also establish the process and timing for the Works Council assuming the delegated functions and for the employer's retention, through a retained rights and/or management rights clause in the **CBA**, of responsibility for such matters until they are assumed by the Works Council.

The Employer and the Union in its capacity as the lawful bargaining representative of the Hourly Unit would agree to the delegation of designated topics and responsibilities to the Works Council. They would also define the organizational structure for participation through collective bargaining. These assigned and delegated responsibilities would thereafter be retained by the Works Council unless and until both the Employer and the Union agree to change that.

A Works Council is intended to offer a voice for all plant employees (except employees employed in supervisory and/or managerial capacities as those terms are defined under the National Labor Relations Act). All employees (other than supervisors and manages) (including both hourly and salary employees) would have the right to participate in Works Council elections regardless of whether they are represented by or belong to a union. All employees (other than

supervisory and managerial employees) would also be eligible to run for membership and serve as members of the Works Council.

2. THE WORKS COUNCIL

2.1 The Role of the Works Council

The Works Council would operate on the basis of authority delegated to it by the Union and Employer and in compliance with U.S. labor and employment laws to carry out assigned roles in accordance with direction and procedures, as well as in the spirit of the Volkswagen Group culture as reflected in its Social Charter and Charter on Labour Relations. The functioning of the Works Council would also be guided by and consistent with the terms of the CBA relative to represented employees. It would be expected to carry out its responsibilities in accordance with the best interests of the employees and the employer and with respect for the principles outlined and with respect for the roles of the Union and the Employer as bargaining partners.

The roles of the Works Council would include:

- making decisions by majority vote of its elected members for the good of the employees as well as the Employer on all issues for which the Works Council would have responsibility;
- representing the interests of employees in the day to day running of the plant. The Works Council members would deal with complaints and suggestions and cases where there is a need of individual support or advice;
- serving as the contact for management for all intra-company issues concerning the topics and tasks assigned to the Works Council under the CBA and the documents establishing the Works Council and its operative documents;
- communicating to the employees concerning the Works Council's activities and conveying information given by the Employer to it;
- initiating, discussing and/or negotiating ideas and other intra-company needs with management;
- acting in a respectful and non-discriminatory manner, in the interests of all employees without regard to gender, race, age, religion, sexual orientation or other legally protected characteristics and without regard to union membership or job classification;
- conducting its activities in a manner that ensures compliance with regulations and the adherence to the applicable laws; and
- carrying out operational management and guideline setting with respect to designated matters, in accordance with the direction of the parties.

2.2 Definition of Participation Rights

A CBA would provide for delegation of specific responsibilities to the Works Council. These responsibilities would be described in detail in the CBA and/or other agreements between the bargaining partners. The bargaining parties would also describe in their agreement the respective level of authority, role and rights of the Works Council as to with each such responsibility.

Each delegated topic would be assigned to the Works Council with a particular "participation right," either Information, Consultation or Co-Determination. In the Charter on Labor Relations, these are defined as follows:

a. The right to **Information** means that on-site employee representatives must be given comprehensive information in due time in order to have opportunity to assimilate the facts of a given circumstance and form an opinion. "In due time" means that information concerning measures must be provided at the time of commencement of any planning process. "Comprehensive" means that all relevant aspects and data must be relayed in comprehensible form. Information must previously have been provided before any measure can be implemented.

b. The right to **Consultation** refers to the necessity for active dialogue between on-site employee representatives and management. The aim of consultation is to give employee representatives opportunity for initiative or protest concerning a given issue or circumstance and, where necessary, for discussion about how to prevent detrimental effects. Consultation would be compulsory prior to the implementation of any measure.

c. The right to **Co-Determination** means the right of on-site employee representatives to consent, control and take initiative in connection with any shared active decision-making process or responsibility. Prior consent must be solicited before any measure can be implemented.

2.3 The Gradual Approach

Since the Works Council would be new for all parties involved, a step by step approach would be followed. At the start, all Works Council members would need to learn to deal with new topics and responsibilities. Similarly, management would have to learn to work with the newly established Works Council. The step by step approach would give the Works Council the opportunity to gain experience and to become engaged with more topics and more rights over what would be an agreed upon period of time, which would be established through negotiations. Through the gradual approach, the parties would seek to avoid overloading and overwhelming the new body with too many tasks and setting expectations too high. Phased assumption of topics and responsibilities would provide it a chance to establish itself.

Initially, the Works Council would be expected to focus on:

a. topics where a high need for involvement is readily apparent; these include work organization, especially agreements on shift calendars and scheduling of overtime;

b. "social issues," such as health and safety; and

c. participation in the implementation of a grievance procedure. It is envisioned that the grievance procedure would include the Works Council as a first level, where it could pursue informal resolution of problems at the plant level. This would be in furtherance of the shared objectives of avoiding the filing and processing of formal grievances and the prompt, non-adversarial resolution of concerns and issues on the shop floor.

Step by step, the other agreed upon responsibilities and functions would gradually be added to the day to day work of the Works Council. Nevertheless the basic division of responsibilities between the Union and the Works Council, which would be agreed to in bargaining and confirmed in the CBA, would not be affected or reduced by this gradual approach and it would be agreed that matters to be delegated would remain the responsibility of the Employer until they were assumed by the Works Council.

The same gradual approach would apply to the respective Participation rights. At the beginning the Works Council would be granted the rights of Information and Consultation and with the experience gained after an agreed upon time period, it would ultimately assume the right for Co-Determination, as defined in the Volkswagen Charter on Labour Relations and adapted to the US legal setting.

The goal would be to achieve a consensus on the agreements between Works Council and the Employer.

In order to ensure that the Works Council would be able to successfully assume all of its responsibilities, VWGoA would commit to providing the necessary training and resources for the Works Council members and for their Employer counterparts. To the extent applicable, VWGoA and the UAW would explore with the Federal Mediation and Conciliation Service what assistance, training, support and other resources are available under the Labor Management Cooperation Act of 1978 for cooperative programs.

Each of the topics, the timeframe and the level of the rights as to each would be described clearly in an agreement – including the description of the framework regulations that will have to be implemented by the Works Council.

3. FUNCTIONING OF THE WORKS COUNCIL

The CBA would include processes for the formation and sustainability of the Works Council.

3.1 The Election and Eligibility

All hourly and salary employees of Volkswagen Chattanooga (except employees with a leadership/management function such as supervisors, assistant managers, managers, general managers and board) would be eligible to serve on, vote for and would be represented by a Works Council.

3.2 Structure of the Works Council

The initial structure of the Works Council would be described in the CBA.

Members of the Works Council would be elected in secret ballot elections. The election procedures would be structured to ensure that members would be chosen from the various areas of the plant and employees from all areas have a voice on the Works Council.

After the Works Council is elected, it would "constitute" itself by electing a chairperson and vice-chairperson from among its members and defining the Works Council's guidelines.

MEMORANDUM

To: All Team Members

From: Sebastian Patta
Vice President, Human Resources

Date: February 4, 2014

Re: Voting Hours February 12, 13 and 14, 2014

We want to make sure that all Team Members are aware of the actual times are aware of the actual times for voting in the representation election. The times are as follows:

Date	Time	Location
February 12, 2014	6:00-9:30 a.m.	Conference Center
	11:00-11:45 a.m.	RB1 Conference Room
	3:00-8:30 p.m.	Conference Center
	11:00-11:45 p.m.	RB1 Conference Room
February 13, 2014	6:00-9:30 a.m.	Conference Center
	11:00-11:45 a.m.	RB1 Conference Room
	3:00-8:30 p.m.	Conference Center
	11:00-11:45 p.m.	RB1 Conference Room
February 14, 2014	6:00-8:30 p.m.	Conference Center

These Times, which are different than those described in paragraph 3(b) on page 5 of the Election Agreement between the Company and the UAW were determined by the National Labor Relations Board to be appropriate times to make sure that all eligible Team Members have the opportunity to vote of they wish to do so.

MEMORANDUM

To: All Team Members

From: Sebastian Patta
Vice President, Human Resources

Date: February 4, 2014

Re: Bargaining Unit Description – Which Team Members Will Be Eligible to Vote

There are minor wording differences in the description of which Team Members will and will not be eligible to vote in the Representation Election that the NLRB will conduct on February 12, 13 and 14, 2014 at the Plant. The actual description of the Unit that is in the Stipulated Election Agreement and will be in the NLRB Notices is as follows:

> All full-time and regular part-time production and maintenance employees employed by Volkswagen Group of America, Inc., and/or its wholly-owned subsidiary Chattanooga Operations LLC, at its facility located at 8001 Volkswagen Drive, Chattanooga, TN 37421 (the "Chattanooga Plant"), including Team Members, Skilled Team Members and Team Leaders but excluding all Specialists, Technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, all temporary and casual employees, all employees employed by contractors, employee leasing companies, and/or temporary agencies, all professional employees, and all guards, managers and supervisors as defined in the Act.

While this wording is slightly different than that in Exhibit A of the Election Agreement between Volkswagen Group of America and the UAW, the meaning is the same. The wording has been changed to comply with the NLRB's practices and requirements.

Chairman KLINE. I thank the gentleman.

Dr. Roe, you are recognized.

Mr. ROE. I thank the chairman for recognition.

Just to clear the record up a little bit, in the Volkswagen vote that just occurred a week or so ago, the union had two years of unfettered access to the employees of that company—two years.

And at the time when Volkswagen was brought to Chattanooga, Mayor Corker—he has been in the Senate now the seventh year—Mayor Corker—his eighth year, I guess—had a lot to do with that company coming there, along with our Democratic Governor, Governor Phil Bredesen, at the time. And what Senator Corker said, he has no control whatsoever of what goes on with that as a U.S.—if he were the mayor or he were the Governor, that would be one thing, but he is not. And I think he exercised his right of free speech to say what he thought about that, as people say.

And we don't seem to hear President Obama being talked about here when he spoke in favor of this union vote policy.

Look, I think I am going to give a shameless shout-out for one of my bills, the *Secret Ballot Protection Act,* which I think right now we need, more than ever we need.

And I grew up in a union household in Tennessee, a factory worker's son. And I understand that unions have a place, they have a right to be there.

And the NLRB's job, in my opinion, is to be fair—they are like the referees in a ball game. They are supposed to be the ones who give both sides a fair hearing. And you have a vigorous debate, and then you have an election, and who wins.

And, look, there is always going to be somebody at the buzzer when you get fouled or you think you got fouled in a basketball game, that you missed a shot because the referee missed a call. I think this was done fairly. The German workers' council from across the ocean spoke up about this. So I think it was a fair election, and we will see how it works out. And if there is another election, so be it, as long as it is a fair and free election.

I want to ask Mr. Browne, why do you believe employers—and I think of my own business with 450 employees. Why do you believe employers need to seek outside counsel?

Mr. BROWNE. In my situation at LaRosa, I have a very limited HR staff: there is myself, a full-time HR manager, and three part-time specialists in payroll, benefits, and recruiting.

I am very versed on the NLRA because I have been in HR for 25-plus years, but in the instance of being faced with an organizing campaign, I would want to seek outside counsel to make sure that we remain objective, that we remain compliant, and that we remain informed on the steps to do things properly.

Mr. ROE. Yeah, you don't have, as we don't have, the expertise to deal. We would have to hire counsel—

Mr. BROWNE. Yes, sir.

Mr. ROE.—sitting down here.

Now, a second question. Any of you, Mr. Messenger or anyone can take this. What is the average time between the petition and the representation election? In other words, what problem are we trying to fix?

Mr. MESSENGER. The average time based upon the information in the proposed rule is 31 days, and the median time is 38.

Mr. ROE. So the average is—okay. How many cases are delayed, and how long? Because that is what we always hear about the exception. And what percent of these elections do the unions actually win?

Mr. MESSENGER. I believe that in 2010 the percentage was 94 percent of elections actually occurred within the board's target timeframe of 56 days. So only about 5 or 6 percent of elections go beyond two months. And, in fact, in most elections, I forget the most recent statistics, but unions generally win the elections that actually do go to certification a little bit over half the time.

Mr. ROE. That is the majority of the time.

And what is usually the source of the delays?

Mr. MESSENGER. Usually there are two. The first is union blocking charges. That happens a lot in decertification campaigns, where employees are trying to get out of union representation. And a common problem is the union will start filing unfair labor practice charges which the NLRB will investigate at length before it will ever even begin to start the election process.

And then the second is when the board itself wants to take it upon itself to set law in a particular instance. So if the board takes an issue presented in an election case, sometimes it could take the board a very long time to rule, and so it is the board's delay, not necessarily the procedure.

Mr. ROE. What recourse does an employer have against a union's false statements or false information? Or is there any recourse?

Mr. MESSENGER. I will leave that to the employers' attorney, if that is okay.

Ms. DAVIS. Very little. There is wide latitude in union representation campaigns for union rhetoric and what they can and can't say, the reason being that the labor board has specifically said that employees are sophisticated enough to know that unions are going to make promises to get elected, and that they realize that even though a union will say things, they can't deliver on anything that they promise because they have to get the employer's agreement.

On the other hand, the rules for the employer are very strict. And I might say, after my 35 years of experience, they are rather counterintuitive to businesspeople. And that is why they seek out labor counsel, because the things that you would probably naturally think that you could do as a businessowner in the face of a union election petition, pretty much everything you would think you could do is illegal. But most employers don't necessarily know that.

Chairman KLINE. The gentleman's time has expired.

Mr. Holt?

Mr. HOLT. Thank you, Mr. Chairman.

First of all, I would ask unanimous consent to introduce in the record a letter from five Members of the New Jersey congressional delegation and both U.S. Senators to Chairman Pearce on this matter.

Chairman KLINE. Without objection.

[The information follows:]

Congress of the United States
Washington, DC 20515

March 4, 2014

The Honorable Mark Gaston Pearce
Chairman
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Chairman Pearce:

We write to express our support of the National Labor Relations Board's February 5, 2014 Notice of Proposed Rulemaking (NPRM) with respect to the Board's rules and regulations governing union elections (Federal Register Doc. 2014-02128). As you know, these proposed amendments are identical to changes that the Board first proposed in June of 2011.

The current process to hold an election on whether to form a union is badly broken. We agree with the Board that the NPRM's amendments would streamline the resolution of questions related to workplace representation when workers petition for a secret-ballot election. More than simply a matter of efficiency, removing delays improves the preservation of workers' rights and facilitates the fair expression of worker's preferences with respect to collective organizing.

Workers deserve a fair process that allows them to decide whether to form a union. We share the belief that employees should be afforded a free, fair, and expeditious process by which to choose workplace representation. The Board's NPRM reflects this belief, and as such, we urge its adoption.

Thank you for your consideration of our views. We hope the Board will act with due deliberation on this matter.

Sincerely,

CORY BOOKER
U.S. Senator

RUSH HOLT
Member of Congress

ROBERT MENENDEZ
U.S. Senator

ALBIO SIRES
Member of Congress

FRANK PALLONE Jr.
Member of Congress

DONALD PAYNE Jr.
Member of Congress

BILL J. PASCRELL Jr.
Member of Congress

Mr. HOLT. Thank you.

You know, as we discuss the details of the election procedures and how the NLRB rule would seek to have a more level playing field so that employers wouldn't have an advantage in the vote, I think it is important to ask really what this is all about, just not get lost in the weeds.

Mr. Browne, why do you oppose organizing and collective bargaining by the employees? Why do you care so strongly?

Mr. BROWNE. I don't think that is where we are at. I think that we are trying to say that employees should be educated, and employers and employees should both have a chance—

Mr. HOLT. Have you invited a union in to organize?

Mr. BROWNE. No, sir.

Mr. HOLT. No. So the whole point here is you are trying to make it hard for them to organize. Why? Why? Let me ask you that.

Mr. BROWNE. I think we are trying to make sure people are educated. And if people are educated, they can make an informed decision on either side of the situation. Without education, they can't really do that.

Mr. HOLT. Come on, let's not play games. You don't want it unionized. Why? Tell me.

Mr. BROWNE. I would have to get a written response back to you, sir.

Mr. HOLT. Okay. I wish you would, please.

Mr. HOLT. Ms. Sencer, in that last line of questioning with Dr. Roe, I think you were itching to make a comment. If you would, briefly, I would—

Ms. SENCER. I was. Thank you.

The problem isn't in the majority of the elections where we have a stipulated election agreement. Most employers play by those rules, and everything works out fine.

In the cases that don't stipulate, though, the average is 160-some-odd days between the time the petition is filed and the time that the election is held. And that is simply too long for the employees. And, as a result, during that time period is when we see the increase in employer-objectionable conduct that results in unfair labor practice charges and others.

When we talk about these blocking charges, however, the blocking charges are not the problem. The most recent statistics showed that there was only 31 blocking charges filed in the entirety of 2012. This is not a significant number.

A blocking charge is always a two-way street. A blocking charge only exists because the employer engaged in some activity that the union found to be objectionable or questionable.

And then the practice, once those blocking charges are filed, is that most regions, or at least the regions that I am familiar with, do a prompt investigation and require the union to give an offer of proof. If this is really close to the election, within 48 hours, most regions continue to hold the election and simply impound the ballots until such time as the blocking charge is actually fully investigated.

More often than not, they require full investigation of the blocking charge prior to the election, but they complete that investigation prior to the election itself and it does not postpone the election.

Mr. HOLT. Thank you. That is useful information.

Let's see, Mr. Browne, you are representing the Society for Human Resource Management, is that correct, today?

Mr. BROWNE. Yes, sir.

Mr. HOLT. And, Mr. Messenger, you are representing the National Right to Work Legal Defense Foundation; is that correct?

Mr. MESSENGER. Yes, sir.

Mr. HOLT. Yeah.

Mr. Browne, who invited you here today? Specifically, who on the committee notified you of the hearing?

Mr. BROWNE. I was notified by the Society for Human Resource Management to come.

Mr. HOLT. Uh-huh. And how did you learn of the hearing?

Mr. BROWNE. I was informed through their government advocacy group.

Mr. HOLT. Uh-huh. By whom?

Mr. BROWNE. By Mike Aitken.

Mr. HOLT. Okay. And this was—how did Mr. Aitken notify you?

Mr. BROWNE. I am sorry, sir?

Mr. HOLT. How did Mr. Aitken notify you?

Mr. BROWNE. He notified me by email.

Mr. HOLT. Yeah, by email. Yeah, that is the way it is done these days. That is the way we communicate, by email. Sometimes by phone. You probably had a phone exchange with the committee also. That is the way it is done.

So there is nothing out of the ordinary that this rule would say that in order to have a level playing field so that people could organize to protect their rights—working conditions, wages, safety in the workplace, all of those things that we bargain collectively about—so that they could have a level playing field to do those things, the unions should have the means of communication that is normally used for communication.

And I presume, Mr. Messenger, you were also notified of this hearing by either phone or email?

Mr. MESSENGER. Yes, email.

Mr. HOLT. Yes. Yes. Thank you.

No further questions.

Chairman KLINE. The gentleman's time has expired.

Ms. Brooks, you are recognized.

Mrs. BROOKS. Thank you, Mr. Chairman.

And thank you all for come here today.

I am going to direct my questions really to the attorneys. As an attorney, I have great concerns about the seven day window. And having not practiced in your space of labor law, I certainly know that any labor lawyers I have ever called for anything are often on the road, you are often in negotiations, you are often in court. And so to have that short of a window to assist a new client I think would be extremely difficult.

And so I am going to start with you, Ms. Davis. And I am curious, following the petition of an election, how much contact do you have with your clients—or how much contact do you and your clients have with the regional director? And can you talk with us about the importance of that process and the types of issues that

you address and/or try to resolve in working with the regional director?

Ms. DAVIS. I have a case pending right now. A petition was just filed last week, and it is in the Cleveland region of the NLRB. And while I am not dealing with the regional director directly, I am dealing with the field attorney who is handling the case. And I have had no fewer than five phone calls over the past three days trying to pinpoint—he is trying to pinpoint with me what, if any, issues we might be raising in the hearing. And I am still exploring with my client whether or not there are any issues, what the appropriate bargaining unit is. This case happens to be a little bit complicated because there is another case that affects it. And so we have quite a bit of at least conversation by phone with the regional office before the actual preelection hearing.

And you are absolutely right about the timeframe now. It is very challenging, as I am sure Ms. Sencer can tell you as well. We don't sit around waiting for the petitions to be filed. We don't control the timing of the filing of the petitions. And oftentimes our schedules are booked up in the next week, as you might imagine, with other appointments and commitments that we have to make.

Mrs. BROOKS. Because you typically don't work with one client at a time.

Ms. DAVIS. Oh, no.

Mrs. BROOKS. Is that correct?

Ms. DAVIS. We do not. Many, many different clients at the same time.

Mrs. BROOKS. And how often do these negotiations that you are having with the regional director lead to compromise or resolve issues?

Ms. DAVIS. Most of the time. In my experience, again, of 35 years, I would say at least 85 percent of all representation cases I have handled—and it has been over 300, at least—have resulted in a stipulated election agreement.

Mrs. BROOKS. And how will this new seven day timetable affect those stipulated agreements?

Ms. DAVIS. I think it is going to have a very detrimental effect. There is going to be a reluctance to enter into a stipulated election agreement, first of all, under the proposed rules, something that we haven't touched on yet.

But under the new rules, stipulated election agreements, the final decisions on what happens do not automatically go to the labor board. They have discretion whether or not to take those issues. Under the current practice, stipulated election agreements, the labor board absolutely has the final word and determination; it is not discretionary. That alone is going to discourage stipulated election agreements.

And the requirements from statement of position and the waiver of those issues I think is going to make—I know I am going to be very reluctant to advise my clients to enter into stipulated election agreements in that short of a timeframe when we are not sure what all the issues are, and that, you know, we are going to waive them if we don't raise them.

Mrs. BROOKS. Based on the 300 cases that you have worked on under the current rules, what is the average length of time that

you would say that you need, as a good attorney, to flesh out the issues, develop the case, and develop your position statements?

Ms. DAVIS. I would say at least 10 days to two weeks. That is a minimum.

Mrs. BROOKS. How many associates do you have working with you?

Ms. DAVIS. Well, if you count all the associates in all of our offices, it would be many. But in my office in New York, I have about four or five associates who work with me closely.

Mrs. BROOKS. And you need to supervise those individuals, as well.

Ms. DAVIS. Absolutely.

Mrs. BROOKS. I have nothing further at this time.

Chairman KLINE. I thank the gentlelady.

And, Ms. Davis, you are recognized.

Mrs. DAVIS of California. Thank you, Mr. Chairman.

Going back to some of the issues that have already been raised, and one of them was the concern that employers can certainly speak out against unionization at any time. I think it was raised that, in fact—you know, the time limit.

Is that correct, I mean, that employers can do that, can speak out against unionization at any time?

Ms. SENCER. Many employers actually start inoculation to unionization efforts at the time of hiring, when it is considered that employees are most vulnerable to those types of comments. They run constant campaigns, "Come to management first. We don't want any third party involved in our relationship." And those happen regardless of whether or not there is any union organizing campaign in place.

Mrs. DAVIS of California. Thank you.

Mr. Messenger, could you clarify for me whether or not it is true or false that a worker can be fired for refusing to attend the meeting that is held by the employer that offers the employer's perspective on unionization? Can an employer be fired for that?

Mr. MESSENGER. An employee?

Mrs. DAVIS of California. Yes, employee. I am sorry. Yes.

Mr. MESSENGER. Yes, I believe employers can require their employees attend meetings on work time to discuss work issues, which can include unionization.

Mrs. DAVIS of California. And if they aren't able to be there, if they don't show up for whatever reason, they could be fired?

Mr. MESSENGER. They could. I mean, it is part of a shift meeting. So if the employer says, there is a shift meeting at 2 o'clock, everyone is required to attend, employees can't say, I don't feel like it.

Mrs. DAVIS of California. Yeah. That sounds like quite a bit of access.

Ms. Sencer, what do you see in terms of that requirement?

Ms. SENCER. Well, we call that the captive-audience meeting. And we would like to eliminate them, but that is not what this rule does. This rule doesn't eliminate the captive-audience meeting. It allows the employer continued access to the employees, as they are under current status quo, throughout the entirety of the election period.

Mrs. DAVIS of California. Yeah. And that doesn't change?

Ms. SENCER. That doesn't change.

Mrs. DAVIS of California. Uh-huh. Okay. Thank you.

Could you also, Ms. Sencer, talk about the seven day window? And where did that come from in the proposed rule?

Ms. SENCER. There is actually a board decision that was issued by a Republican-majority board that says it should be, I believe, five days or something of that nature.

In my practice, the regions that I deal with, most of the regions on the west coast, but specifically I will talk to 20, 32, 21, and 31, which are the four regions that cover California, we are regularly scheduled for a hearing within seven days of the petition being filed as part of the status quo.

The seven day rule inside the proposed rules is really just a best-practice standardization process, where that is the process that we have been using. And, in fact, Jones Day attorneys on the other side regularly appear within those seven days to have those hearings when a hearing is necessary.

But like Ms. Davis, my experience is that it does lead to stipulated election agreements because the parties have the pressure of a hearing sitting on them. The regions use that pressure of the seven days to get to the hearing to help the parties reach an agreement on a stipulated election agreement.

Mrs. DAVIS of California. Uh-huh. So any idea why you did have members that you mentioned that were pushing for the five days? They obviously thought that was sufficient.

Ms. SENCER. They obviously thought that was sufficient. Seven days, I guess, is seen as a little more humane.

Mrs. DAVIS of California. Yeah.

I think what we are trying to talk about here is leveling the playing field. And so sometimes some of the changes that are being proposed by this rule actually can serve employers equally. Can you describe a few of those?

Ms. SENCER. The union employee will be in the same position as the employer when it comes to this. And so, in a decertification petition or a petition to remove a due status, they would be under the same rules of requiring to take positions within seven days and having a hearing or a stipulated agreement within seven days.

And, in fact, the pressure placed on a union in that situation is stronger than the pressure placed on the employer, because when we are in a decertification situation, there isn't really a dispute about the scope of the bargaining unit. You are going to use the bargaining unit as it is described in the collective bargaining agreement. And there isn't a whole lot of room, there isn't a reason to have a hearing, most of the time, other than to discuss the time and date of the election, which if the union refused to agree, under the proposed rules the region would just set without a hearing. And that would balance that part out.

Mrs. DAVIS of California. Yeah. Okay. Well, thank you very much. I think my time is about to expire.

I yield back.

Chairman KLINE. I thank the gentlelady.

Mr. Guthrie, you are recognized.

Mr. GUTHRIE. Thank you, Mr. Chairman.

I appreciate the witnesses for being here. I appreciate your testimony today.

I have a question, I think, to Mr. Browne. You were asked about how you were communicated with about this meeting, and you—I think we established it was via email—

Mr. BROWNE. Yes, sir.

Mr. GUTHRIE.—which a lot of us either email or text now more than we do other things. So my question is, the Society of Human Resources Management contacted you?

Mr. BROWNE. Yeah.

Mr. GUTHRIE. How did they get your email address? Were you compelled to provide that to them?

Mr. BROWNE. No, sir. I have allowed them to have my email address. I am part of their activity with advocacy, so that we already had that agreement, that I knew that they could email me.

Mr. GUTHRIE. So your personal information was given to them by choice?

Mr. BROWNE. Yes, sir.

Mr. GUTHRIE. In the rule that is on the Excelsior list, it says, "Under the proposed regulation, employers would be required to provide an expanded Excelsior list, including each employee's name, address, phone number, email address, work location, shift information, and classification to the union within two days of the petition for the election."

In your experience, I mean, how do small employers keep those records? And do you have any concerns about providing your employees' personal information to any third party? I am not talking just union, but any third party.

Mr. BROWNE. We do get information when people come on board as new hires. And am I concerned that it gets shared outside of us to any party? Yes, I am. We have a good relationship with our employees, and they expect us to take care of them, and that includes their personal information. So for it to be given out to somebody without consent would be a concern.

Mr. GUTHRIE. Do you think your employees would object to their information being shared without their permission?

Mr. BROWNE. Yes, I think so.

Mr. GUTHRIE. I mean, knowing your employees, you would do that, as well?

Mr. BROWNE. Yes, sir.

Mr. GUTHRIE. Well, thank you.

That is my question, Mr. Chairman, and I yield back.

Chairman KLINE. I thank the gentleman.

Mr. Grijalva, you are recognized.

Mr. GRIJALVA. Thank you, Mr. Chairman.

Ms. Sencer, let me go to the point that Ms. Davis was making about the seven days. The *California Agricultural Labor Relations Act* stipulates that elections are conducted in seven days of the filing of an election petition. Share with us your experience in that process, because we do have an example.

Ms. SENCER. Sure. In California, the agricultural workers are allowed to organize under the *California Agricultural Labor Relations Act.* It is a group of workers that is not protected by the *National Labor Relations Act.*

Under the procedures used at the Ag Board, the petition gets filed and the election is held within seven days. During those seven days, first, the employer has an obligation to provide all of the names and contact information of the bargaining unit employees, including actual residences. One of the things that we see on the NLRB Excelsior list currently is P.O. boxes, but, actually, under the Ag Act, they are required to give an actual street address where a person resides. And during that seven days, the union has access to the employer's facility. And the union goes on to the employer's property and is part of a campaign, and the employer is running its anti-campaign at the same time, and it seems to work out just fine.

Most employers can run an anti-campaign, if they so choose, within seven days because there is a whole field of labor management consultants and management lawyers whose job it is to run anti-campaigns in short periods of time. And under the Ag Act, we have not seen much problem with an actual election being held within seven days.

Mr. GRIJALVA. Thank you.

Let me follow up with another question, if I may. As part of the discussion by both the witnesses and members of the committee, I think it was commented that you have to paint a good picture, the union has to paint a good picture, so that their information is about a good picture, much like politicians do when they are contacting voters and tell them only the good stuff about themselves. And then another comment was made, but it is left to the people that are voting because they should be sophisticated enough to know the difference and to make the right decision.

I ask you that because, in the balance question that was brought up, this proposed change would skew the balance, according to the three other witnesses, in a very unfair way toward employers. My question is, as we take a snapshot of as it is now, what are those prerogatives that employers have that employees don't have with regards to being able to unionize or to ask for an election at a point?

Ms. SENCER. In the status quo, the employer has unfettered access and can make its anti-union campaign as an ongoing process regardless of whether or not there is actually a union-organizing campaign in place. This rule doesn't change any of that; that still allows the employer to do so.

The union does generally paint itself in its most positive view. Most people do when going out to meet someone. They introduce themselves—

Mr. GRIJALVA. Nobody on this dais does that, so that is a shock to us.

Ms. SENCER. But the same is true of employers. When I go to interview for a job, the employer doesn't tell me about the lawsuits that have been filed against it; it doesn't tell me about the disputes it has had in employee relations. It puts out the best information that they have. They say, it is a great place to work and everyone is happy here. It is up to me, as the individual interviewing for that job, to see what I can find if I want to dig deeper to determine if there is anything negative about that employer and whether or

not that makes a difference in my decision to work for the employer.

And the same is somewhat true in the union situation, although, if you go back to Mr. Holt's question as to why are you against unionization, if the employer stays neutral because it has no view on it, that is just fine also. And the employees are sophisticated enough to make a decision—

Mr. GRIJALVA. And in the case of Chattanooga, the employer was staying neutral, Volkswagen.

Ms. SENCER. Yes.

Mr. GRIJALVA. And the anti-union propaganda and campaign was from the outside. The company itself had not hired the teams of people to come in there and try to bust an election. They came from the outside. It came from a Senator, it came from a State Senator. And that is where the complaint will be coming from. Am I—

Ms. SENCER. Yes, that is where the objection comes from. There were members inside the plant who were against having a union, and they were speaking freely—individuals inside the plant, who are part of the proposed bargaining unit, who are against unionization, and they were speaking freely. And that conduct is not objectionable in the slightest. This was the outside conduct that was really interfering with the election.

Mr. GRIJALVA. As a practitioner in labor law and in labor relations, there is a whole industry that promotes itself as, "I can stop this from happening to your place." Can you tell us a little bit about that industry, how big it is and how rich it is?

Ms. SENCER. It is huge.

The employers have the right to hire them, obviously. In my field, in California, as soon as my client tells me who the anti-union consultant is, the union-buster or persuader who is going to come in is, we can tell you just about down to the word the message that they are going to put out. It is an anti-union campaign in a box, so to speak.

And they have lots of people who work for them. They come straight on site. They start having one-on-one meetings with employees inside the facility, with a supervisor from the site, along with the consultant who is being brought in from the outside. They come right in, they sit down, they have one-on-one meetings, they have three-person meetings, they have captive-audience meetings.

And this all happens very quickly. Generally, before we have even signed the stipulated election agreement from the date that a petition is filed, we will see those people on site.

Chairman KLINE. The gentleman's time has expired.

Mr. Rokita.

Mr. ROKITA. I thank the chairman for the time.

I thank the witnesses. My apologies for not getting to hear your testimony in person. I was at a, frankly, at a Budget Committee meeting. 'Tis the season in Washington. But I did try to read some of your testimony and had some questions regarding that.

Before I get to that, though, I was wondering if Mr. Messenger or Mr. Browne would want to respond at all to the response made to the last question.

Mr. Messenger, anything to add or detract from what was said? Is anything illegal about what—I heard the term "rich" being used.

I don't know what that implied, or if the "union-busters" were acting illegally or something? Is that what you understood?

Mr. MESSENGER. No, in fact, you know, the persuader industry exists because the NLRB rules are so tight on employers of a landmine field of all the things they can and can't say, that they are forced to hire professionals who know exactly what to say, as Ms. Sencer said, down to the letter, because anything else could be construed to be an unfair labor practice or objectionable.

So it is simply a way to get out opposing information within the strict letter of the law.

Mr. ROKITA. Absolutely. Thank you.

Mr. Browne, anything there? No? Okay. Just want to be fair.

Mrs. Davis, in Ms. Sencer's testimony, if I read it right, she states, "In cases where there is no stipulation and a hearing is held, the election is not held until a minimum of 65 days and often longer after the petition is filed." However, I also saw that most recent NLRB data indicates that 94 percent of election are held within 56 days of the petition.

So, in your experience, is Ms. Sencer's estimate accurate? And why are there delays?

Ms. DAVIS. Well, in my experience, even with a hearing, usually an election is held no later than eight weeks after the petition has been filed. There are going to be outliers that affect the statistics, you know, when you get to the median and the average. But, normally, and I advise clients of this, that without a hearing, with a stipulated election agreement, the election is going to be in six weeks; with a hearing, it is probably going to be in eight weeks. So there is maybe a two week differential.

And the reason why there is sometimes a two week differential for a hearing to be held is because very important bargaining unit issues and individual eligibility issues are being determined in that hearing process prior to the election so that the employer, the employees, and the union know who is actually eligible to vote and who can vote.

As I said earlier in my testimony, that determination is extremely important when it comes to who is a supervisor and who isn't. Because supervisory conduct binds the employer. And when it is not known whether, in fact, an individual is a supervisor or not, that person can break the rules, bind the employer, and lead to a rerun election.

So those issues are very important and should be determined prior to the election being held. The rules will not allow that unless the issue affects more than 20 percent of the bargaining unit.

Mr. ROKITA. How? Deficiency, unfairness in these rules?

Ms. DAVIS. I don't think that it is going to lead to any more efficiencies. I think what may—

Mr. ROKITA. I meant to say deficiencies, sorry, and unfairness in these rules as currently written. Is that what you are saying?

Ms. DAVIS. Yes. Yes.

And under the proposed rules, it is my position that it may lead to quicker elections, maybe, but it is not going to lead to quicker collective bargaining or collective bargaining agreements. Because issues are now going to be deferred until after the election. And

until those issues are resolved, the union is not going to be certified and there is going to be no obligation to bargain.

So a lot of the concerns that we heard about some years back when there were discussions of the *Employee Free Choice Act* about how long it takes to get a first contract negotiated, those issues are going to be exacerbated by these rules, in my opinion, because the collective bargaining is going to be delayed because there is not going to be—these issues aren't going to be decided and there is not going to be a certification.

That also puts a tremendous burden on employers, as Ms. Sencer testified earlier about the laboratory conditions or the "bubble," I believe she called it. It would require the employer to maintain those conditions all during that time.

Mr. ROKITA. Thank you.

Switching back to Mr. Messenger, again, referring to Mrs. Sencer's testimony, she states, "In virtually all the cases where clients have filed election petitions, the employers had been aware of the organizing efforts prior to the filing."

In your experience, then, do the employers always know an organizing effort is under way prior to the petition? And is it important for employers to know?

Mr. MESSENGER. Employees often don't know or, at the very least, they don't know the imminence.

So, for example, especially in a large facility, the union only needs 30 percent of the unit to sign a petition in order to get an election. If you are in a hospital on the second shift, you might not know what is going on the first shift.

And, even more importantly, you don't know the actual timeframe. So you might hear through the grapevine that someone was visited by a union organizer. What does that mean? Is there going to be an election tomorrow? Is there going to be an election next year? It is uncertain. So there is really no notice beforehand of exactly what is coming.

Chairman KLINE. The gentleman's time has expired.

Mr. Bishop?

Mr. BISHOP. Thank you, Mr. Chairman.

I thank the panel for being here.

I kind of want to pick up on where Representative Holt was going, which is the big picture of why—why there seems to be such great determination to thwart efforts to organize. And I want to put three facts on the table.

The first is we have been measuring these two statistics I am about to cite since World War II. Corporate profits as a percentage of the economy are higher than they have ever been. At the same time, total payroll compensation—that is to say, the total amount of money people make—is lower than it has ever been. That is fact one.

Fact two: Seventy percent of our economy is rooted in consumer spending. And most economists tell us that the reason that our economy is struggling is that there is slack in the economy, there is insufficient demand in the economy, people aren't spending enough money.

And, thirdly, the share of unionization in the private sector workforce is at 6.7 percent—6.7 percent—the lowest it has been in 100 years.

And so my question is—my question is, do any of you—and I am going to start with you, Mr. Messenger—do you think these statistics are completely unrelated, totally coincidental that the proportion of our workforce that is unionized is lower than it has been in 100 years but also total payroll compensation as a share of the economy is lower than it has ever been? Is that totally a coincidence? Or could there possibly be some causal relationship there?

I am going to ask you, Mr. Messenger, and, Mr. Browne, I am going to ask you. But I also have another question, so I am going to ask you to answer quickly.

Mr. MESSENGER. Thank you.

I am not an economist, so I can't speak directly as to cause and effect as to those issues. However, it does sort of appear to me, as an economic layman, that increasing unionization is not a way to increase the competitiveness of American businesses, especially those that have to compete with those overseas.

Mr. BISHOP. But hear me. Total corporate profits as a percentage of the economy are higher than they have ever been. So that sounds to me like our corporations are doing pretty well in terms of competition, no?

Mr. MESSENGER. Again, I can't speak to, you know, the economics of exactly how that works. But what I can tell you is that, to the extent the argument is that the government should therefore lean in favor of unionization and impose that upon employees—

Mr. BISHOP. Nope.

Mr. MESSENGER.—because supposedly that is in the best interest—

Mr. BISHOP. Nope. But that is not what the government is saying. What the government is saying is, let's have an election process that is free, fair, open, and, in the words of Mr. Browne, achieves the delicate balance that presumably still exists.

Mr. MESSENGER. I don't see how the conclusion flows from the premise. The premise is there is not enough unionization, therefore—

Mr. BISHOP. All right, I am asking you. Union workers make more than non-union workers in the main, correct?

Mr. MESSENGER. I don't know. I can supplement testimony to that. But I can tell you that most of the States that are economically growing are right-to-work States with low levels of unionization.

Mr. BISHOP. Mr. Browne?

Mr. BROWNE. Similarly to Mr. Messenger, I don't think I can really comment as to how the economics of things works, whether it would be directly correlated. So it would be hard for me to comment.

Mr. BISHOP. It seems to me, if we have an economy that is 70 percent rooted in consumer spending and our economy is struggling because there is slack demand, it seems to me that what we want to do is create an environment in which people who live paycheck to paycheck have slightly larger paychecks so that they can spend more. And it seems to me that the efforts that at least Mr. Mes-

senger's organization is actively engaged in going in the exact opposite direction.

Let me move to one more thing. You used the term "delicate balance" that currently exists. Under current law, union organizers cannot even go onto the property of a workplace unless they are invited. Yet Mr. Messenger just testified that an employee can be fired for failing to attend a captive-audience meeting in which the detriments of unionization are presented.

Does that fall under anyone's reasonable definition of a delicate balance?

Mr. Messenger?

Mr. MESSENGER. I would say it does, because the important thing here, it is the employer's property and it is their paid work time. So it is their property, it is what they are paying the individuals to do. So, as any other private citizen, they should be able to do what—

Mr. BISHOP. All the cards rest with the employer. You are telling us how difficult it is for the employer, yet you are also saying that the employer can conduct captive-audience meetings and do so with impunity, and yet the organizers have no access to the workplace at all, and that is fine, that falls under the heading of a delicate balance?

Chairman KLINE. The gentleman's time has expired.

Dr. Bucshon?

Mr. BISHOP. Thanks, Mr. Chairman.

Mr. BUCSHON. Thank you, Mr. Chairman.

Ms. Sencer must think this is funny, but I certainly don't. This is a serious hearing.

Ms. Sencer, do you believe in the First Amendment?

Ms. SENCER. Absolutely.

Mr. BUCSHON. Does that apply to everyone?

Ms. SENCER. Absolutely.

Mr. BUCSHON. As you are aware, the President of the United States came out and—publicly came out in favor of unionization of the plant in Tennessee. But since that doesn't disagree with what you agree with, I guess other members of the government can't voice their First Amendment rights.

Ms. Davis, a question to you.

Ms. SENCER. Do I get to answer that?

Chairman KLINE. It is his time.

Mr. BUCSHON. It is my time.

Chairman KLINE. Dr. Bucshon's time.

Mr. BUCSHON. Ms. Davis, Ms. Sencer said that employers can campaign constantly. Is there a limitation on captive-audience speeches?

Ms. DAVIS. Yes. Captive-audience speeches cannot be held 48 hours before the election.

Mr. BUCSHON. And does reducing the time between petition and election affect this at all?

Ms. DAVIS. Affect the number of—

Mr. BUCSHON. Yeah, affect the time.

Ms. DAVIS. Absolutely, because it is still 48 hours, and it is a short time period. So it is going to definitely shorten the amount

of time the employer has to have captive-audience meetings if the employer so chooses to have them.

Mr. BUCSHON. Thank you.

Mr. Messenger, in Ms. Sencer's testimony, she states that providing employee phone numbers and email addresses is no more intrusive than providing a home address. Certainly, providing an employee's home address is intrusive.

In your experience, do unions visit employees' homes and call their phones during an organizing drive?

Mr. MESSENGER. Yes, if they do have the telephone numbers, which usually they would only get under an organizing agreement because they can't get it under current board procedures. But, yes, they absolutely visit employees' homes, sometimes repeatedly, to either convince them to not oppose the union or to support the union, yes.

Mr. BUCSHON. By the way, I just wanted to say that my dad is a retired United Mine Worker, and I have a great deal of respect for the workers' rights to organize and collectively bargain as long as there is a fair playing field. I wanted to say that. I forgot to say that at the beginning.

How have employees described the interactions, Mr. Messenger? You have these interactions at their homes. Does anybody talk about that?

Mr. MESSENGER. Yes. In my experience, I think the main thing that comes away, from my experience, is it is persistent. A lot of times they say, "I'm not interested, go away," and the union comes back anyways.

As far as the actual interaction, it varies. Sometimes it is the soft sell. It is the college student that says, just sign this just to show that—so the union knows that I visited here. It is actually a union authorization card. Other times it is a more intimidating visit of several large men, you know, saying, we want you to support the union. It just varies upon the circumstance and what the union believes will be most effective.

Mr. BUCSHON. Okay. Thank you.

Chairman, I yield back.

Chairman KLINE. I thank the gentleman.

Mr. Loebsack?

Mr. LOEBSACK. Thank you, Mr. Chair.

This really has been a pretty good hearing. It has been very informative, and I appreciate all the witnesses who have been here.

I have a few questions, but I first want to go back to what Mr. Bishop said and add to his three data points. I don't have all the specifics, but I do know that our workforce has become ever more productive. So add that to the other arguments that were made by Mr. Bishop. We have a more productive workforce than we have had really ever, I think. And over the course of the last few decades, we have seen that increase that much more.

That leads me to believe, certainly, that our workers deserve to have a better deal. There is no question about it. If they are going to do more and they are going to produce more, then I think they do deserve a better deal. And I think that is where unions come in. I think unions can provide a better deal for those workers.

And I like the idea of a delicate balance, because that is something that is really important. Of course we have to take into account the employer's concerns. Of course we have to take into account the employee's concerns. There is no question about that.

I have some concerns about this whole timeframe issue that we have been talking about here—six weeks, eight weeks, whatever, for an election. I don't know if folks here are aware of the fact that the 2010 election in Great Britain was one month long—one month long—a national election in a first-world country, in a European country. Think about that. And here we are arguing about whether this ought to be six weeks or eight weeks or whatever the case may be.

I am a little bit—I guess it is sort of the Iowan in me, I kind of wonder, well, how long should this be for all the arguments to get out, for both sides to make their arguments and make sure they have access to the folks they are trying to influence? I don't really know how long that should be.

But I want to ask you, Mr. Messenger, in an ideal world, how long should that election take? How long should it be?

Mr. MESSENGER. I don't know if I have a number, you know, to pull out. But I do know in the 1959 amendments 30 days was suggested, and I believe that was ultimately not accepted because it was considered to be too short.

Mr. LOEBSACK. Right.

Mr. MESSENGER. But that was a number put out there in 1959 in those amendments.

Mr. LOEBSACK. But it has not been 30 days. Right, Ms. Sencer? What are the numbers again?

Ms. SENCER. Well, I mean, I dispute the idea that with a hearing you actually get there in eight weeks. I just want to kind of clarify that point first.

When a petition is filed and a hearing is held, when a notice of the hearing goes out for a seven day hearing and the employee requests and is granted a week extension, you are already at 14 days.

Mr. LOEBSACK. All right.

Ms. SENCER. You then have the hearing itself. The employer and the union, if the union so chooses to do it, have an opportunity to file a post-hearing brief. That is another week. You are already at 21 days.

Then the regional director has to issue a decision and direction of election. That usually takes about two to three weeks. You can see how this is growing.

Mr. LOEBSACK. Uh-huh.

Ms. SENCER. Now we are up to 42 days.

Mr. LOEBSACK. Right.

Ms. SENCER. And when they do issue that decision and direction of election, it allows for 25 days for review to be held by the board prior to the election being scheduled. So the election will be scheduled, but it will be scheduled for the 26th or the 30th day out.

So, at that point, you are over two months. You are well over two months even in your best-case scenario, where the regional director issues the decision promptly and the employer does not take the appeal and the hearing only takes one day and the employer does

not request and is granted additional time above the seven days to file their post-hearing brief. It is too long.

It would be great if we could get to 30 days. Personally, I would like to see it be less. But guaranteeing that elections were held in 30 days, as compared to 56, which is the current average that they talk about, would be a significant improvement for the workers who, during that period of time while the petition is pending before the election is held, are subject to, as the statistics show, increasing amounts of unfair labor practices.

Mr. LOEBSACK. All right.

Mr. Messenger, I have a basic question about the process we are talking about here. Do you believe in the legitimacy of the process?

Mr. MESSENGER. Of the current board procedures?

Mr. LOEBSACK. Right, of the *National Labor Relations Act* and the NLRB and just having elections for unions in the first place? Do you believe in the legitimacy of it?

Mr. MESSENGER. No. I believe that each individual should be free to choose whether or not they wish to support a union, that exclusive union representation shouldn't be imposed on any individual. Even if 90 percent of their coworkers wish to support a union, that is no justification for forcing the union on the dissenting 10 percent.

Mr. LOEBSACK. I appreciate that. Thank you for your forthrightness.

Thank you all.

And I yield back. Thank you.

Chairman KLINE. I thank the gentleman.

Ms. Bonamici, recognized.

Ms. BONAMICI. Thank you, Mr. Chairman.

And to our witnesses, thank you. This has been an interesting hearing. And this is an important issue for the committee to consider because it is really, at a basic level, about good jobs for our constituents, growing the economy, and, as others have mentioned, really looking at the decline of the middle class.

And the *National Labor Relations Act* is intended to protect workers' rights to organize and to collectively bargain and to make sure that employers are treating employees fairly through that process. And I want to reflect a little bit about the history.

I actually grew up, even though I represent a great district in the State of Oregon, which is now my home State for many years, I grew up just outside of Detroit. My grandfather worked at Ford Motor Company both before and after the UAW.

And when we really look at what happened, when, you know, people were beaten and punched and kicked, I think we have come a long way since those days. But when we reflect on that history and the need to really protect the process for workers, it is important to remember how far we have come but also how important it is.

As we now in Congress look for ways to get the economy back on track and our country back to work, we should be asking how we can support our workers' rights to choose a union, and not erode those rights. And it is about finding that right balance.

So, in your testimony, Ms. Sencer, you state that employers are aware of union-organizing efforts before a petition is filed. I know

that you also suggest that some employers have these anti-union inoculation programs in place. I wonder if you could expand on those a little bit. How are they aware? Talk a little bit about some of the anti-union inoculation programs.

And I also want to mention briefly that, my home State of Oregon, the legislature actually banned captive-audience meetings. That was challenged in the courts and upheld at the State level. So some States are taking action.

So please expand.

Ms. SENCER. The employers generally know because employees talk and employers listen. So every meeting that a union holds in an organizing campaign, they presume that at least one person in that room is actually going to go back and tell their manager that they were involved in the meeting.

You see it through social media, where people are friends on Facebook with a supervisor and they posted that they have been to a meeting and are learning about a union. You see it where a group of people who don't usually have lunch together will go out and have lunch at a restaurant across the street. A manager will do a walk by that restaurant and determine, oh, they are meeting with someone we don't know and there is a union sticker there.

The employers just gain knowledge by watching their workforce, and they generally notice well before a petition is filed. And that is when the anti-campaign starts. You know that is when the anti-campaign starts and that the employer has knowledge because the statistics all show and experience plays out that some of the worst unfair labor practices happen in an attempt to get the petition not to be filed.

If you fire a leader right before the petition is going to be filed, the union does not file—or expected to be filed, the union generally doesn't file the petition right then. The support isn't there because the workers are scared. They have seen what happens to an employee who speaks out or is looking to speak out in favor of unionization.

The anti-campaigns that the employer runs walk the line of what is acceptable conduct and acceptable speech. They can't make threats—they can't make explicit threats or provide explicit benefits once the petition is filed. But there has been definitely more than one occasion where in the period right before the petition is filed an employer grants a wage increase.

Ms. BONAMICI. Thank you.

And, earlier, Ms. Davis said under the new rules there wouldn't be an opportunity to litigate bargaining unit issues before an election. Do you agree with that?

Ms. SENCER. I don't. The limitation on the prehearing election would be dependent upon the size of the dispute that is in question. If it doesn't affect more than 20 percent, you wouldn't do it in advance. If it affects less than 20 percent, the employees who were involved would vote subject to a challenge ballot procedure, and that would then be resolved after the election if those are determinative.

And when it comes to the supervisory issue, which can be kind of tricky sometimes—it is not always immediately clear—both sides

run the same risk of using those employees as part of the organizing campaign.

If the union uses someone to solicit cards from other employees who is later found to be a supervisor, then the entirety of the election is tainted, just the same way that if the employer uses someone who is later found to be not a supervisor or is a supervisor in part of the unit, they would also taint the election.

Ms. BONAMICI. Thank you.

And, quickly, we have heard about the more than 65,000 comments that were submitted, and there is a suggestion that those weren't considered. Is there any reason to believe—I assume that the comments were not all one-sided. Is there any reason to believe that the NLRB did not consider the comments in formulating this rule?

Ms. SENCER. There is no reason to presume that they have not been considered or will be considered. Since we are still in the proposed rulemaking stage, a final rule hasn't been issued yet.

Ms. BONAMICI. And from the others—I still have a few seconds—is there any reason to believe that the NLRB is not considering the comments?

Mr. MESSENGER. I would say because they issued the exact same rule again. They proposed this rule in 2011; there were 60,000-some comments. And then this year, just two weeks ago, three weeks ago, they issued the exact same rule verbatim. They didn't take any of the comments into consideration. They just said, here it is again.

And so I think that indicates that they didn't consider those comments, and it is questionable whether they will consider them now.

Ms. BONAMICI. Thank you.

And I see my time has expired.

Chairman KLINE. The gentlelady's time has expired.

Ms. BONAMICI. Thank you, Mr. Chairman.

Chairman KLINE. Mr. Pocan?

Mr. POCAN. Sure. Thank you, Mr. Chairman. I appreciate the chance to have a hearing about the NLRB and elections.

And I come from a fairly, I think, unique perspective, is that I am a small-business owner of a specialty printing firm who is a union shop. So I come from a little bit of management and understand the labor perspective.

And, you know, I am glad that we get a chance to talk about, I think, what happened three weeks ago in Tennessee, which was really a travesty. The fact that the only Volkswagen plants that don't have these worker counsels or unions are in Russia, China, and Chattanooga should be a bit of concern to begin with. But the fact that the company was in general supportive, but it was outside players who came in.

And I would like to pick up a little bit from where Mr. Tierney was, if I could, Mr. Messenger, with you, is, on the amicus that you filed, specifically, I guess, against a member on this committee, but you say, "Employers could enlist a mayor to inform employees that union representation will result in the loss of their employer's contracts within the city. The various manners in which politicians could use the cloak of government authority to mislead employees to vote for or against union representation is endless."

And I just, again, want you to take a look at that quote from Senator Corker. And, you know, just in the spirit of, I guess, intellectual honesty, isn't it imperative that the board find objectionable conduct by government officials that can be constructed as official action to effect an election, isn't that what the Senator is doing?

Mr. MESSENGER. No. What happened in Trump Plaza is that representatives were—

Mr. POCAN. No , I didn't ask you about Trump Plaza. What I am asking you about is Senator Corker's statement.

So from what you just said about someone coming and trying to influence an election or elect a government official using that cloak of authority, you don't see a cloak of authority in a U.S. Senator from the State saying that they are about to get another line of SUVs if they don't certify the union? And even though the company said that is not true, they said the company had old talking points, you don't find that to be in the spirit of your filing?

Mr. MESSENGER. No, because, if anything, Senator Corker's statement disclaimed an earlier statement by a member of Volkswagen management, actually, a board of directors, part of IG Metall, which is the German union, which suggested they wouldn't get additional work without a workers' council.

Mr. POCAN. So you are not answering the question again. You are a lawyer; I am not. So let's try answering the question the way, you know, I would.

You don't find that statement at all—in the spirit of what you said in your brief, you don't find that is what that person is doing right there; Senator Corker is trying to influence the question with that statement? A yes-or-no answer. It is pretty simple.

Mr. MESSENGER. Was he trying to influence the election?

Mr. POCAN. Yeah.

Mr. MESSENGER. He may have been trying to put out information about it. Would I find that—

Mr. POCAN. Okay, so you don't want to answer that.

Let me try a different person, State Senator Bo Watson. State Senator Bo Watson said, "The members of the Tennessee Senate will not view unionization in the best interest of Tennessee. It will be exponentially more challenging for the legislature to approve future subsidies." So now he is threatening subsidies.

Was Senator Bo Watson in the spirit, intellectual honesty, in the spirit of your briefing, in violation?

Mr. MESSENGER. No.

Mr. POCAN. No.

Mr. MESSENGER. Because he was not trying to impersonate an official board process.

Mr. POCAN. So the fact that he is on the Commerce and Labor Committee doesn't change your opinion.

Mr. MESSENGER. No. And, actually—

Mr. POCAN. And the fact that he is on the Ways and Means Committee that affects the finances of the State doesn't change your opinion.

Mr. MESSENGER. There is no question about who he is, but what—

Mr. POCAN. Well, how about the fact that he is the president pro tem of the Senate? This is a guy who pulls strings and can get

things done. And when he says, you are going to lose this, you didn't see that as undue influence in the spirit of your briefing?

Mr. MESSENGER. I do not. And I request the permission to—

Mr. POCAN. All right. I appreciate that.

Mr. MESSENGER.—file a supplemental briefing on this to try to clarify this legal issue, because I don't know if I will be getting an opportunity to fully express why it is distinguishable as a legal matter.

Mr. POCAN. Yes. I just think, you know, it seems like there may be a little bit of intellectual honesty issues in what I read in your very words, and I see in the statement from Senator Corker and from the State Senator, Senator Watson, and yet you don't seem to have a problem.

Mr. MESSENGER. I—

Mr. POCAN. You know, my perspective, I guess, as an employer—let me just take the broader on this. You know, I have basically all the face cards, and most have big numbers, in a poker game as an employer when it comes to an election like this. Right? I have the ability to hire someone, to fire someone, to give someone a pay raise, to promote them or not, to set their hours. So the fact that—and what the NLRB is doing is trying to make sure we have as equal a playing field when it comes to these elections.

So, you know, you brought up some of the concerns about trying to share this data. I guess, a question for Ms. Sencer. One would be, can an employer currently use an email to contact an employee about the election?

Ms. SENCER. Absolutely.

Mr. POCAN. And can they use a telephone to do the same?

Ms. SENCER. Absolutely.

Mr. POCAN. So really this is about evening the playing field between what the employer can do to contact and what the union can do to contact?

Ms. SENCER. Yes. And it is not unusual, actually, for an employer to include an insert in a pay statement with their wages that gives a message about anti-union—

Mr. POCAN. Okay.

And just really quickly in the remaining seconds I have, do you think the statements by Senator Corker and Senator Watson are in violation and should cause a new election by the NLRB?

Ms. SENCER. I do think that they are probably going to be found to be objectionable, resulting in a rerun election, yes.

Mr. POCAN. Thank you.

Chairman KLINE. The gentleman's time has expired.

I want to certainly thank the witnesses and yield time to Mr. Miller for any closing remarks he may have.

Mr. MILLER. I have no further remarks. I thank the witnesses very much for their participation today.

Chairman KLINE. I thank the gentleman.

I also want to thank the witnesses. Very expert testimony. I appreciate your forbearance sometimes and your willingness to engage in the debate and the discussion. We appreciate your time.

There being no further business, the committee stands adjourned.

[Questions submitted for the record and their responses follow:]

April 1, 2014

Mr. Steve Browne
Vice President of Human Resources
LaRosa
2334 Boudinot Ave
Cincinnati, OH 45238

Dear Mr. Browne:

Thank you for testifying at the March 5, 2014 Committee on Education and the Workforce hearing entitled, "Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than April 15, 2014, for inclusion in the official hearing record. Responses should be sent to Benjamin Hoog of the committee staff, who can be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the committee.

Sincerely,

John Kline

John Kline
Chairman

Questions Submitted by Representative Rush Holt:

1. As we discuss the details of election procedures and how the National Labor Relations Board (NLRB) would make the playing field more level so that employers don't have an advantage with the vote. Why do you oppose organizing and collective bargaining by employees? Why do you care so strongly that the situation remain as is, so that, as I would say, the employer maintains an advantage in the vote?

2. In Tennessee we have seen politicians and outsiders affect the elections. Would the NLRB rule have affected the ability for outsiders to influence the election?

[Mr. Browne's response to questions submitted for the record follows:]

April 17, 2014

Dear Chairman Kline:

Thank you again for the opportunity to testify on behalf of the Society for Human Resource Management at the March 5, 2014 Committee on Education and Workforce hearing entitled, "Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule."

Enclosed are my responses to Representative Holt's questions for the official hearing record.

Thank you again for the opportunity to testify on this important issue.

Sincerely,

Steve Browne, SPHR
Executive Director of Human Resources
LaRosas's, Inc.

[illegible]

Questions Submitted by Representative Rush Holt:

Question #1: As we discuss the details of election procedures and how the National Labor Relations Board (NLRB) would make the playing field more level so that employers don't have an advantage with the vote. Why do you oppose organizing and collective bargaining by employees? Why do you care so strongly that the situation remain as is, so that, as I would say, the employer maintains an advantage in the vote?

Response #1: I do not oppose organizing and collective bargaining for employees. In fact, both the Society for Human Resource Management (SHRM) and I support the right of employees to form, join, assist or refrain from joining a union without threats, interrogation, promises of benefits or coercion by employers or unions. As I outlined in my written testimony, SHRM believes the proposed Ambush Election Rule is imbalanced and would put employers at a disadvantage during an organizing effort.

Question #2: In Tennessee we have seen politicians and outsiders affect the elections. Would the NLRB rule have affected the ability for outsiders to influence the election?

Response #2: Because I am not an attorney, I cannot say with certainty whether the NLRB rule would have affected the ability for outsiders to influence the election in the Tennessee situation. SHRM and I strongly believe that an employee's decision on unionization should be based on relevant and timely information and free choice, and under current law, employees have ample time to hear from both the union and employer prior to a representation election.

[Whereupon, at 12:02 p.m., the committee was adjourned.]

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